No. 3926

United States

Circuit Court of Appeals

For the Ninth Circuit.

HARRY KOCKOS and ANDREW KOCKOS, Copartners Doing Business Under the Firm Name and Style of KOCKOS BROS., and KOCKOS BROS., a Partnership,

Plaintiffs in Error,

vs.

C. ITOH & CO., LTD., a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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JOHN S. PARTRIDGE, Esq., Foxcroft Bldg., and RAYMOND PERRY, Esq., Mills Bldg., San Francisco, Calif.,

Attorneys for Plaintiffs in Error.

Messrs. BROWNSTONE & GOODMAN, Humboldt Bank Bldg., San Francisco, Calif.,

Attorneys for Defendant in Error.

In the District Court of the United States for the Northern District of California.

C. ITOH & CO., LTD., a Corporation,

Plaintiff,

vs.

HARRY KOCKOS and ANDREW KOCKOS, Copartners Doing Business Under the Firm Name and Style of KOCKOS BROS., and KOCKOS BROS., a Partnership,

Defendants.

Complaint.

Plaintiff complains of defendants and for cause of action alleges:

1. Plaintiff C. Itoh & Co., Ltd., is a corporation created and organized and existing under and by virtue of the laws of Japan.

2. Defendants Harry Kockos and Andrew Kockos are now and were at all times herein mentioned copartners doing business in and residing in the City and County of San Francisco, in the

Northern District of Californa, and are now and were at all times herein mentioned citizens and residents of the said State of California.

3. That said plaintiff herein is a citizen of a foreign state, to wit, Japan, being a corporation created, organized and existing under and by virtue of the laws of Japan; this is a suit of a civil nature and the amount in controversy herein exclusive of interest and costs, exceeds the sum of Three Thousand ($3,000.00) Dollars.

4. Heretofore, to wit, on November 28, 1919, at Seattle, Washington, plaintiff and defendants made and entered into the following contract:

Seattle, Wash., November 28, 1919.

MERCHANDISE CONTRACT.

BUYERS: Kockos Bros., San Francisco, California. [1*]

SELLERS: C. Itoh & Co., Ltd., Seattle.

MERCHANDISE: Chinese Shelled Panuts, 40 Count (Average).

QUANTITY: Approximately One Hundred (100) Tons.

QUALITY: 1919 Crop F. A. Q. of the Season's crop.

TIME OF DELIVERY: December/January from the Orient.

PLACE OF DELIVERY: Seattle, Washington.

PRICE: 12¢ per pound F. O. B. Cars, duty paid.

TERMS: Sight Draft against Railroad Bill of Lading (Collection charges for Buyer's Account.)

*Page-number appearing at foot of page of original certified Transcript of Record.

WEIGHT: Seattle Net Re-weights.

REMARKS: Seattle Chamber of Commerce Certificate of Inspection final as to Crop, Count, Quality and Condition.

This sale is based on present United States Customs-House Classification, any change in same being for buyer's account. Sellers are not responsible for nondelivery or delay of delivery, nor for any damage or loss resulting directly or indirectly from acts of God, perils of the sea, restrictions imposed by any Government, State or Government authority, strikes, riots, fires, floods, accidents, epidemics, war insurrections, lockouts, breakdowns of machinery, shipping restrictions, embargoes, commandeering of vessel or from any causes beyond control of seller at any time. Such delay, however, shall not excuse buyers from accepting delayed delivery. In no case shall seller be responsible after delivery of goods in good condition to carrier at place designated in contract.

All war or excise taxes levied or assessed, after date of this contract in any way affecting this sale of said goods, are for buyer's account.

KOCKOS BROS.,
By ANDREW KOCKOS,
Buyers.

C. ITOH & CO., LTD.,
By N. NAKAMURA,
Sellers."

A. U. PINKHAM & CO.,
By A. U. PINKHAM,
Broker.

5. Plaintiff has in all respects complied with the terms and conditions of the aforesaid contract on its part to be performed and upon arrival of said peanuts from the Orient in early March, 1920, tendered and offered to deliver to said defendants the said one hundred (100) tons of Chinese shelled [2] peanuts as described in the aforesaid contract and the said defendants inspected and examined the same and after such inspection and examination, the said defendants requested plaintiff to ship the same to Chicago, Illinois, from Seattle, Washington. That plaintiff complied with such request and shipped said peanuts to Chicago and upon arrival at Chicago, plaintiff again tendered and offered to deliver the same to defendants, and the said defendants then refused and neglected to accept delivery thereof.

6. The excess of the amount due from said defendants to plaintiff under said contract for said one hundred (100) tons of Chinese shelled peanuts, over the value of the same to plaintiff, was and is the sum of eighty-five hundred ($8500.00) dollars.

7. The market value of said one hundred (100) tons of peanuts at Seattle, Washington, during February, March and April, 1920, was and is the sum of fifteen thousand five hundred ($15,500.00) dollars.

8. By reason of the failure of defendants to accept delivery of said peanuts as aforesaid, plaintiff has been damaged in the sum of eighty-five

hundred ($8500.00) dollars, no part of which sum has been paid.

AS A SECOND, SEPARATE AND FURTHER CAUSE OF ACTION, plaintiff complains and alleges:

1. Incorporates as part of this its second cause of action, paragraphs 1, 2, 3, 4 and 5 of its first cause of action, the same as if all of said paragraphs were herein set out in full.

2. That after the arrival of said peanuts in Chicago, and the refusal of the defendants to accept the same, plaintiff notified defendants that unless defendants accepted the said [3] peanuts, plaintiff would sell the same for their account. Thereafter and after the said defendants refused and neglected to accept the same, and after notice to defendants of the time and place of sale, plaintiff sold said peanuts for the account of defendants, receiving therefor the full market price thereof. That the net proceeds of said sale was fifteen thousand five hundred ($15,500.00) dollars. That the excess of the amount due from defendants under said contract over the net proceeds of said sale is the sum of eighty-five hundred ($8500.00) dollars, no part of which has been paid.

WHEREFORE, plaintiff prays judgment against defendants for the sum of eighty-five hundred ($8500.00) dollars, together with interest from the date of filing this complaint at the legal rate and costs of suit.

BROWNSTONE & GOODMAN,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco,—ss.

Louis H. Brownstone, being first duly sworn, deposes and says: That he is one of the attorneys for plaintiff named in the foregoing complaint; that said plaintiff resides out of the county where affiant has his office, to wit, said plaintiff resides out of the City and County of San Francisco, State of California, and for that reason, affiant makes this affidavit on behalf of plaintiff; affiant has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on [4] information or belief and as to those matters he believes it to be true.

LOUIS H. BROWNSTONE.

Subscribed and sworn to before me this 7th day of October, 1920.

[Seal] JOHN WISNOM,
Notary Public in and for the City and County of San Francisco, State of California.

In this cause the defendants Harry Kockos and Kockos Bros., a copartnership, etc., having been regularly served with process, as appears from the record and papers on file herein, and having failed to appear and plead, answer or demur to plaintiff's complaint, within the time allowed by law, and the time for appearing and pleading, answering and demurring having expired.

Now, upon application of Messrs. Brownstone and Goodman, attorneys for plaintiff, the default

of the defendants Harry Kockos and Kockos Bros., a copartnership, etc., is hereby entered herein, according to law.

In Testimony Whereof, I have hereunto set my hand and seal of the District Court of the United States, for the Northern District of California, this 6th day of November, A. D. 1920.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed Oct. 7, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [5]

Summons.

UNITED STATES OF AMERICA.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

C. ITOH & CO., LTD., a Corporation,
Plaintiff,

vs.

HARRY KOCKOS and ANDREW KOCKOS, Copartners Doing Business Under the Firm Name and Style of KOCKOS BROS., and KOCKOS BROS., a Partnerhip,
Defendants.

Action brought in said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City and County of San Francisco.

BROWNSTONE & GOODMAN,
Plaintiff's Attorneys.

The President of the United States of America, GREETING: To Harry Kockos and Andrew Kockos, Copartners Doing Business Under the Firm Name and Style of Kockos Bros. and Kockos Bros., a partnership, Defendants.

YOU ARE HEREBY DIRECTED TO APPEAR and answer the complaint in an action entitled as above, brought against you in the Southern Division of the United States District Court for the Northern District of California, Second Division, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any moneys or damages demanded in the complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the Complaint.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 7th day of October, in the year of our Lord one thou-

sand nine hundred and twenty and of our Independence the one [6] hundred and forty-fifth.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

United States Marshal's Office,
Northern District of California.

I HEREBY CERTIFY, that I received the within writ on the 11th day of Oct., 1920, and personally served the same on the 11th day of October, 1920, upon Harry Kockos, by delivering to and leaving with said defendant named therein personally, at the City and County of San Francisco in said District, a certified copy thereof, together with a copy of the complaint, certified to by —— attached thereto.

J. B. HOLOHAN,
U. S. Marshal.
By Lawrence J. Conlon,
Office Deputy.

San Francisco, October 11th, 1920.
Northern District of California,—ss.

I hereby certify and return, that on the 11th day of Oct., 1920, I received the within summons and that after diligent search, I am unable to find the within-named defendant Andrew Kockos within my district.

J. B. HOLOHAN,
United States Marshal.
By Lawrence J. Conlon,
Deputy United States Marshal.

[Endorsed]: Filed Nov. 6, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [7]

Notice of Motion to Set Aside Default.

To the Above-named Plaintiff and to Its Attorneys, Messrs. Brownstone & Goodman:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that on Monday, the 9th day of May, 1921, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, defendant Harry Kockos will move to the above-entitled Court for an order vacating, annulling and setting aside the default of the said defendant Harry Kockos heretofore entered.

Said motion will be made upon the grounds of mistake, inadvertence, surprise and excusable neglect of the said defendant, upon the affidavits of H. F. Chadbourne and Harry Kockos herewith attached, and upon the copy of the pleading proposed to be filed herein by the said defendant, Harry Kockos, and upon all the records, files and papers in the above-entitled cause.

JOHN S. PARTRIDGE,
Attorney for Defendant, Harry Kockos.

(Title of Court and Cause.)

State of California,
City and County of San Francisco,—ss.

Harry Kockos, being first duly sworn, deposes and says:

That he is one of the defendants in the above-entitled cause; that he has fully and fairly stated

to his attorney, John S. Partridge, all of the facts in connection with the transactions set forth in plaintiff's complaint on file herein, and that after such statement he has been advised by his said attorney that he has a good and meritorious defense to said complaint.

WHEREFORE, affiant prays that his default be vacated, [8] annulled and set aside.

HARRY KOCKOS.

Subscribed and sworn to before me this 2d day of May, 1921.

[Seal] MARY D. F. HUDSON,
Notary Public in and for the City and County of San Francisco, State of California.

(Title of Court and Cause.)

State of California,
City and County of San Francisco,—ss.

H. F. Chadbourne, being first duly sworn, deposes and says:

That he is an attorney at law and is connected with the office of John S. Partridge, the regular attorney for the defendant herein, Harry Kockos; that on or about the 11th day of October, 1920, the said Harry Kockos called at the office of the said John S. Partridge in the city and county of San Francisco, State of California, and delivered to affiant herein a copy of the complaint and summons in the above-entitled action and informed affiant herein that the said copy of complaint and summons had been served on him on that day, and the said Harry Kockos at the same time requested

affiant herein to enter his appearance in said cause, that through mistake, inadvertence and excusable neglect the said copy of complaint and summons was placed in the files in the office of said John S. Partridge in which was contained the papers, records and files in another matter in which the said Harry Kockos was a party, and the said copy of complaint and summons was entirely lost sight of by affiant until affiant herein was advised that [9] the default of the said Harry Kockos had been entered; that affiant immediately upon learning of the entry of the default of said Harry Kockos telephoned the attorney for the plaintiff herein, Mr. Louis H. Brownstone, and explained the facts herein stated to the said Louis H. Brownstone and requested him to consent to having the said default vacated, annulled and set aside; that the said Louis H. Brownstone informed affiant that he had no authority to grant the request of affiant but that he would consult his associates in Seattle, Washington, and would advise affiant later; that later on affiant was advised by the said Louis H. Brownstone that his said associates would not consent to setting aside the said default.

WHEREFORE, affiant prays that the default of the defendant, Harry Kockos, heretofore entered, be vacated, annulled and set aside, and that said defendant, Harry Kockos, be permitted to enter his appearance in the above-entitled cause.

H. F. CHADBOURNE.

Subscribed and sworn to before me this 29th day of April, 1921.

[Seal] MARY D. F. HUDSON,
Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a true copy of the within notice is hereby admitted this 2d day of May, 1921.

BROWNSTONE & GOODMAN,
Attys. for Plaintiff.

[Endorsed]: Filed May 4, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [10]

(Title of Court and Cause.)

Demurrer.

Now comes the defendant, Harry Kockos, and demurring unto the complaint of plaintiff on file herein, for grounds of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action against said defendant.

II.

That said complaint is uncertain in that it cannot be ascertained therefrom whether the value of one hundred (100) tons of Chinese shelled peanuts to the plaintiff was the sum of eighty-five hundred dollars ($8500.00), at Chicago, Illinois, or at Seattle, Washington.

III.

That said complaint is unintelligible in the same

particulars as herein set forth that it is uncertain.

IV.

That said complaint is ambiguous in the same particulars as herein set forth that it is uncertain and unintelligible.

WHEREFORE, defendant, Harry Kockos, prays that plaintiff take nothing by this action and that he be hence dismissed with his costs.

JOHN S. PARTRIDGE,

Attorneys for Defendant, Harry Kockos.

I hereby certify that I am the attorney for Harry Kockos, one of the defendants in the above-entitled action; that in my opinion, the foregoing demurrer is well taken in point of law and that the same is not interposed for purposes of delay.

JOHN S. PARTRIDGE. [11]

[Endorsed]: Filed May 4, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [12]

At a stated term, to wit, the March term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 9th day of May, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,454.

C. ITOH & CO.

vs.

HARRY KOCKOS et al.

(Order Granting Defendants' Motion to Set Aside Default, etc.)

Defendants' motion to set aside default of defendants Harry Kockos and Kockos Bros. came on to be heard and after arguments being submitted it was ordered that said motion be and the same is hereby granted on condition that within 5 days the defendants pay $150.00 as counsel fee to plaintiff's attorney and that an answer be filed within 5 days. Ordered that the defendant's demurrer be stricken from the files and that the cause keep its place on the trial calendar if plaintiff shall so desire. [13]

(Title of Court and Cause.)

Answer.

Now come the defendants above named and in answer to the complaint of plaintiff on file herein admit, deny and allege:

I.

That these defendants have no information or belief as to the corporate existence of plaintiff, and placing their denial upon that ground deny that plaintiff is a corporation created and or-

ganized and existing, or created or organized or existing under and by virtue of the laws of Japan.

II.

That these defendants have no information as to the allegation set forth in paragraph 3 of plaintiff's complaint as to the citizenship of the plaintiff, and placing their denial upon that ground deny the same.

III.

Admit that on or about the 28th day of November, 1919, the plaintiff and defendants entered into a contract set forth in paragraph 4 of said complaint for the purchase of Chinese shelled peanuts, 40 count average.

IV.

Deny that plaintiff has in all respects, or in any way or at all, complied with the terms and conditions, or terms or conditions of the contract on its part to be performed, or at all, and deny that upon arrival of said peanuts, or any peanuts, or at all, from the Orient, or at all, in early March, 1920, or at any other time, or at all, tendered and offered or tendered or offered, or at all, to deliver to the defendants one hundred (100) tons of Chinese shelled peanuts as described in the contract, or any other peanuts of 40 count average, and [14] deny that upon defendants' inspection and examination of the peanuts alleged to have been tendered said defendants requested the plaintiff to ship the same to Chicago, Illinois, from Seattle, Washington. In this behalf defendants allege that upon the representation of the plaintiff that

the peanuts so tendered were of the 40 count average, and upon that representation alone did the defendants give plaintiff shipping instructions to ship the same to Chicago, Illinois. Admit that after said shipping instructions were given to plaintiff and upon the tender of documents from plaintiff to defendants that defendants refused to accept delivery thereof, and in this behalf allege that plaintiff did invoice the defendants for sixteen hundred (1600) bags of Chinese shelled peanuts 38/40 count and four hundred (400) bags Chinese shelled peanuts 38/40 count, and did tender a certificate of the Seattle Chamber of Commerce and upon inspection of said certificate of the Seattle Chamber of Commerce, which under the said contract between parties as set forth in plaintiff's complaint was final as to crop, count, quality and condition, these defendants did ascertain for the first time that the count of said peanuts so tendered were an average count of 37 with the exception of five hundred sixty bags (560). That defendants immediately notified plaintiff that the tender was not within the terms of the contract and did offer to accept and pay for the five hundred sixty (560) bags shown to be within the terms of the contract, but that plaintiff refused to deliver said five hundred sixty (560) bags to said defendant.

V.

Deny that the excess of the amount due from the defendants to the plaintiff under the contract for said or any one hundred (100) tons of Chinese

shelled peanuts, over the value of the same to the plaintiff, or at all, was and is, [15] or was or is the sum of *eight thousand five hundred,* or any other sum, or at all.

VI.

Deny that the market value of one hundred tons of Chinese shelled peanuts average 40 count at Seattle, Washington, or at any other place, during February, March and April, 1920, was and is the sum of fifteen thousand five hundred ($15,500.-00) dollars, or any other sum, or at all, and in this behalf defendants allege that during the month of February and March, 1920, the market price at Seattle, Washington, and other places in the United States was the full contract price of twenty-three thousand nine hundred twenty-five (23,925) dollars. That during the month of April there was a slight decline in Chinese shelled peanuts.

VII.

Deny that by reason of the failure or any failure or any act of defendants, or at all, to accept delivery of said peanuts, or any peanuts of 40 count average, plaintiff has been damaged, or is damaged, or at all, in the sum of eight thousand five hundred ($8,500) dollars, or any part or portion thereof.

In answer to the second, separate and further cause of action defendants admit, deny and allege:

I.

As to the allegations incorporated and referred to in paragraph 1 of said second cause of action

referring to paragraphs 1, 2, 3, 4, and 5 of said first cause of action, the defendants herewith incorporate and refer to the respective admissions and denials set forth in the answer to the first cause of action as if the said denials were herewith set forth in full.

II.

Admit that upon the arrival of the peanuts in Chicago, [16] to wit, one thousand four hundred forty (1440) bags of 37 count, and 560 bags of 40 count defendants refused to accept same for not being 40 count average, and deny that said plaintiff notified said defendants that unless said defendants accepted said peanuts in full compliance with the contract plaintiff would sell the same for defendants' account, and in this behalf allege that plaintiff only notified defendants that it would hold them for all damages for the nonpayment of their draft. Admit defendants refused to accept the 37 average count Chinese shelled peanuts tendered by plaintiff, but deny that after notice of a time and place, or time or place of sale, or at all, plaintiff sold said peanuts for the account of defendants, or at all, receiving therefor the full market price thereof, or at all. These defendants have no information as to the net proceeds of said alleged sale, and placing their denial upon that ground deny that the net proceeds of said alleged sale was the sum of fifteen thousand five hundred (15,500.00) dollars, or any other sum or at all. Deny that the excess of the amount due from defendants, or any amount due from the

defendants under said contract, or at all, over the net proceeds, or any proceeds, or at all of said sale is the sum of eight thousand five hundred ($8,500) dollars, or any other sum, or at all.

And by way of further answer to both alleged causes of action set forth in plaintiff's complaint, these defendants allege:

I.

That under the terms of the contract entered into between plaintiff and defendants, the merchandise to be delivered was Chinese shelled peanuts, 40 count average. Seattle Chamber of Commerce Certificate of Inspection final as to crop, count, quality and condition. [17]

II.

That plaintiff on or about the twenty-second day of March, 1920, did tender to the defendants an invoice specifying that the count of the sixteen hundred (1600) bags of Chinese shelled peanuts were of 38/40 count, and the count of four hundred (400) bags Chinese shelled peanuts were 38/40. Defendants upon inspection of the Seattle Chamber of Commerce Certificate did discover that the one thousand four hundred forty (1440) bags of the sixteen hundred (1600) bags were not 38/40 count, but 37 count average.

III.

That immediately upon obtaining said information said defendants did offer to accept the five hundred sixty (560) bags of the 38/40 count, and did offer to pay for same *by* that plaintiff

without right or cause did refuse to deliver said five hundred sixty (560) bags of 38/40 count.

IV.

That defendants have been at all times able, ready and willing to accept and pay for Chinese shelled peanuts 40 count average under their contract, but that plaintiff has failed and refused to tender said peanuts.

And by way of further and separate defense to both causes of action of plaintiff's complaint, these defendants allege:

That after inspection of the Seattle Chamber of Commerce Certificate that one thousand four hundred and forty (1440) bags of the two thousand (2000) bags contracted for were of the 37 count and not in accordance with the contract, these defendants did notify plaintiff that they were ready and willing to accept 37 count peanuts on a proper adjustment, but that plaintiff refused to enter into an agreement of adjustment, and did notify defendants that they must accept and pay for the 37 [18] count peanuts as being in full compliance by plaintiff of its contract on its part.

And by way of further and separate defense to both causes of action of plaintiff's complaint, these defendants allege:

That any damage suffered by plaintiff by reason of the contract entered into on the 28th day of November, 1919, between the plaintiff and the defendants was caused by plaintiff's refusal to tender peanuts within the terms of the contract and by

its own acts, and that plaintiff has suffered no damage whatsoever by reason of any act of the defendants.

WHEREFORE, defendants pray that plaintiff take nothing by this action and that they be hence dismissed with their costs.

JOHN S. PARTRIDGE,
RAYMOND PERRY,
Attorneys for the Defendants.

State of California,
City and County of San Francisco,—ss.

Harry Kockos, being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action and matter, and makes this verification for and on behalf of said defendants; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief and as to those matters that he believes it to be true.

HARRY KOCKOS.

Subscribed and sworn to before me this 14th day of May, 1921.

[Seal] MARY D. F. HUDSON,
Notary Public in and for the City and County of San Francisco, State of California. [19]

Receipt of a copy of the within answer is admitted this 14th of May, 1921.

BROWNSTONE & GOODMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed May 14, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

At a stated term, to wit, the March term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 16th day of May, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,454.

C. ITOH & CO., Ltd.,

vs.

HARRY KOCKOS,

(Order Granting Defendants' Motion to Set Aside Attachment.)

Defendant's motion to set aside attachment came on to be heard and after arguments being submitted it was ordered that said motion be and the same is hereby granted. [21]

(Title of Court and Cause.)

Verdict.

We, the jury, find in favor of the plaintiff and

assess the damages against the defendants in the sum of eighty-five hundred and 00/100 dollars.

J. M. MENDELL,
Foreman.

[Endorsed]: Filed June 7, 1922. Walter B. Maling, Clerk. [22]

(Title of Court and Cause.)

Judgment on Verdict.

This cause having come on regularly for trial upon the 6th day of June, 1922, being a day in the March, 1922, term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issue joined herein; L. H. Brownstone and L. E. Goodman, Esqrs., appearing as attorneys for plaintiff and John S. Partridge and Raymond Perry, Esqrs., appearing as attorneys for defendants; and the trial having been proceeded with on the 7th day of June in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages against the defendants in the sum of eighty-five hundred and 00/100 dollars. J. M. Mendell, Foreman," and the Court having ordered that judgment be

entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that C. Itoh & Co., Ltd., a corporation, plaintiff, do have and recover of and from Harry Kockos and Andrew Kockos, copartners doing business under the firm name and style of Kockos Bros. and Kockos Bros., a partnership, defendants, the sum of eighty-five hundred and 00/100 ($8500.00) dollars, together with its costs herein expended taxed at $266.30.

Judgment entered June 7, 1922.

WALTER B. MALING,
Clerk. [23]

A true copy.

[Seal] Attest: WALTER B. MALING,
Clerk.

[Endorsed]: Filed June 7, 1922. Walter B. Maling, Clerk. [24]

(Title of Court and Cause.)

Clerk's Certificate to Judgment-Roll.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court this 7th day of June, 1922.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed June 7th, 1922. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 16,454.

C. ITOH & CO., a Corporation,
Plaintiff,

vs.

HARRY KOCKOS and ANDREW KOCKOS, Co-partners Doing Business Under the Firm Name and Style of KOCKOS BROS., and KOCKOS BROS., a Partnership,
Defendants.

Defendants' Engrossed Bill of Exceptions.

BE IT REMEMBERED that heretofore and after issue properly joined, the above-entitled cause came on for trial before the said Court at a stated term thereof, holden in the City and County of San Francisco, State of California, in the Southern Division of said United States District Court, in

and for the Northern District of California, Second Division, and on, to wit, the 6th day of June, 1922, then and thereon a jury was duly and regularly impanelled and sworn to try the said cause and on said day and the succeeding day of June 7th, 1922, oral and documentary evidence were presented on behalf of the said plaintiff and on behalf of the said defendants and that the following proceedings, and none other, were had upon the hearing and trial of the said cause:

Mr. Brownstone, attorney for plaintiff, read the depositions of R. A. Crandall, George B. Graham, Arthur U. Pinkham, L. W. Hitson, George A. Jensen, G. A. Pande, Arthur E. Campbell and Adrian H. De Young. [26]

Deposition of R. A. Crandall, for Plaintiff.

R. A. CRANDALL, a witness for plaintiff, being first duly sworn, deposed and said as follows:

I reside in Seattle. I am supercargo for the N. Y. K. Steamship Company. During the year 1920 I was traffic manager for C. Itoh & Company, Ltd. Mr. N. Nahamura was manager.

(The following document was identified by the witness as a contract between C. Itoh & Company, of Seattle, and Kockos Bros. of San Francisco.)

Plaintiff's Exhibit No. 1.

"C. ITOH & CO., LTD.,
Exporters and Importers,
Central Building.
Seattle, Wash., November 28, 1919.

MERCHANDISE CONTRACT.

BUYERS: Kockos Bros., San Francisco, California.

SELLERS: C. Itoh & Co., Ltd., Seattle.

MERCHANDISE: Chinese Shelled Peanuts, 40 count (Average).

QUANTITY: Approximately One Hundred (100) Tons.

QUALITY: 1919 Crop F. A. Q. of the Season's crop.

TIME OF DELIVERY: December/January from the Orient.

PLACE OF DELIVERY: Seattle, Washington.

PRICE: 12¢ per pound F. O. B. Cars, duty paid.

TERMS: Sight Draft against Railroad Bill of Lading (Collection charges for Buyer's account).

WEIGHT: Seattle Net Re-weights.

REMARKS: Seattle Chamber of Commerce Certificate of Inspection final as to Crop, Count, Quality and Condition.

This sale is based on present United States Customs House Classification, any change in same being for buyer's account. Sellers are not responsible for non-delivery or delay of delivery, nor for any damage or loss resulting directly or indirectly from acts of God, perils of the sea, restrictions imposed by any Government, State

or Government authority, strikes, riots, fires, floods, accidents, epidemics, war insurrections, lock-outs, break-downs of machinery, shipping restrictions, embargoes, commandeering of vessels or from any causes beyond control of seller at any time. Such delay, however, shall not excuse buyers from accepting delayed delivery. In no case shall seller be responsible after delivery of goods in good condition to carrier at place designated in contract.

All war or excise taxes levied or assessed, after date of this contract in any way affecting this sale of said goods, are for buyers account.

KOCKOS BROS.,
By ANDREW KOCKOS,
Buyers.
C. ITOH & CO., LTD.,
By N. NAKAMURA,
Sellers.

A. U. PINKHAM & CO.,
By A. U. PINKHAM, Broker. [27]

The document was admitted as Plaintiff's Exhibit No. 1.

The witness then identified the following document, which was then admitted in evidence as Plaintiff's Exhibit No. 2:

Plaintiff's Exhibit No. 2.

A. U. PINKHAM & CO.
Incorporated.
Colman Building.
Seattle, U. S. A.

Nov. 28, 1919.

C. Itoh & Co.,
Central Building,
Seattle, Wash.

Gentlemen:

We beg to confirm sale of the following merchandise under the terms and conditions below recited; namely:

SELLERS: C. Itoh & Co., Seattle.

BUYERS: Kockos Bros., San Francisco.

ARTICLE: Chinese Shelled Peanuts, 40 count, purchased as 38/40's by sellers.

QUANTITY: One hundred (100) tons.

QUALITY: F. A. Q. season 1919, Seattle Chamber of Commerce certificate to be final.

SHIPMENT: December-January from Orient.

PRICE: Twelve Dollars ($12.00) f. o. b. cars Seattle, duty paid.

WEIGHTS: Net re-weights.

TERMS: Sight draft against shipping documents.

BROKERAGE: One percent (1%) to A. U. Pinkham & Co.

REMARKS: Sale made on proviso shipping instructions given in order that seller may obtain absorption allowance from railroad.

Yours very truly,
A. U. PINKHAM & CO., INC.
Per A. U. PINKHAM,
Pres.

JG/LJ.

The witness then identified the following document which was then admitted in evidence as Plaintiff's Exhibit No. 3: [28]

Plaintiff's Exhibit No. 3.

A. U. PINKHAM & CO.
Incorporated.
Colman Building,
Seattle, U. S. A.

December 6, 1919.

Messrs. C. Itoh & Co., Ltd.,
Central Building,
Seattle, Wash.

Gentlemen:

We return herewith your Merchandise Contract, dated November 28th, covering sale of 100 tons Chinese Shelled Peanuts, which has been duly signed by the buyer, Kockos Brothers, San Francisco.

Yours very truly,
A. U. PINKHAM & CO., INC.
Per A. U. PINKHAM,
Pres.

GK.

(Deposition of R. A. Crandall.)

The witness then proceeded as follows:

As I recall the peanuts called for in the contract, Exhibit 1, arrived in Seattle the latter part of February or 1st of March. I do not know whether the Seattle office notified Kockos Bros. about Feb. 19, 1920, of the date arrival of eighty tons of these peanuts.

The witness then identified the following document, which was offered in evidence as Plaintiff's Exhibit No. 4:

Plaintiff's Exhibit No. 4.

C. ITOH & CO., LTD.
Exporters and Importers.
Central Building,
Seattle, Wash., February 19, 1920.

Messrs. Kockos Bros.,
San Francisco, California.

Gentlemen:

We are in receipt of a cable from our Kobe office advising that they shipped under date of January 31st ex S. S. "Eastern Victor" Eighty tons Chinese Shelled peanuts 40 count to apply on your contract with us dated November 28th, for 100 tons.

The "Eastern Victor" is due to arrive here on or about March 1st, and we ask that you send us shipping instructions as soon as possible.

Very truly yours,
C. ITOH & CO., LTD.,
By N. NAKAMURA. [29]

N/MC.

(Deposition of R. A. Crandall.)

The witness then identified the following document, which was offered in evidence as Plaintiff's Exhibit No. 5:

Plaintiff's Exhibit No. 5.

"WESTERN UNION TELEGRAM.

1920 Mar 2 PM 5 25.

A445 EA 20 Nite
Seattle Wash 2
Kockos Bros 1733
40 California St
San Francisco Calif

Hundred tons peanuts to cover your contract dated November twenty eighth arrived today Ex Eastern Victor Wire us shipping instructions

C. ITOH AND CO., LTD."

The witness proceeded as follows:

H. L. Hudson & Co., formerly located in Seattle, asked us for permits to inspect the peanuts for Kockos Bros. We sent them the permits. (The witness identified the following document which was offered in evidence *of* Plaintiff's Exhibit No. 6.)

Plaintiff's Exhibit No. 6.

"March 9, 20.

H. L. Hudson & Company,
Hoge Building,
Seattle, Washington.

Gentlemen:

Referring to purchase of Kockos Bros., San Fran-

cisco, California, of one hundred tons Chinese Shelled peanuts, forty count;

We are herewith handling you sampling permits on East Waterway Dock covering entire lot. You will be able to obtain the amount of sample you desire.

Kindly furnish us disposition as soon as possible.

Very truly yours,
C. ITOH & CO., LTD.,
By ————————.

ARC/MC
Enc."

The witness then identified the following document as a copy of one of the permits sent to H. L. Hudson & Co. with the above letter, which permit was offered in evidence as Plaintiff's Exhibit No. 7: [30]

Plaintiff's Exhibit No. 7.

"J. T. STEEB AND COMPANY, INC.
211 White Building,
Seattle Wn.

File ——
Samples—5 lbs.
Honorable Collector of Customs,
Seattle, Wash.
Dear Sir:

I, A. Freeborn Atty. in Fact, hereby make application for sample of the following merchandise

(Deposition of R. A. Crandall.)

prior to entry under article 223, Customs Regulations 1915, T. F. 37374, Paragraph 106.

Imported for

Use of

STEAMER.	LADING NO.	MARKS.	QUANTITY.	CONTENTS.
Eastern Victor	Kobe/Seattle B 13	⟨ITC.⟩ Seattle 118#	1600 Bags	Shelled peanuts.

J. T. STEEB AND CO. INC.
By A. FREEBORN,
Atty. in Fact.

We hereby consent to the above sampling.
C. ITOH AND COMPANY LTD.
By N. NAKAMURA,
Assistant Manager,
Holder of Bill of Lading.

We hereby concur the above request.
MITSUBISHI GOSHI KAISHA,
Seattle Agency.

R. H. CIBBIK,
Carrier.

To the Inspector:
Please allow above.
(Seal) CHAS. WILKINSON,
Deputy Collector."

The witness proceeded as follows: I also sent H. L. Hudson & Co., a permit to inspect a shipment of 400 bags marked—Three Stars. We had received no instructions from Kockos Bros. up to March 12, 1920, when we wrote the letter to the National Importing and Trading Co., sending them inspection permits in these two lots of peanuts.

(Deposition of R. A. Crandall.)

The National Importing & Trading Co. had an office in Seattle at that time. I secured a sample permit for them to inspect the permits on their request as they said they had bought the peanuts described in Plaintiff's Exhibit 1 [31] from Kockos Bros. and desired to inspect and sample the goods before they accepted them. On March 15th, 1920, I telegraphed Kockos Bros. for shipping instructions, as follows:

Plaintiff's Exhibit No. 9.

Seattle, Wash., March 15, 1920.

Kockos Bros.,
40 California Street,
San Francisco, Cal.

Referring to our wire March second advising you of arrival of Hundred tons peanuts to cover your contract dated November twenty eighth and asking that you wire us shipping instructions to date shipping instructions have not been received Unless they are furnished immediately it will be necessary that we place this shipment in storage at your expense

C. ITOH & CO. LTD.
302 Central Bldg. Seattle.

(Paid, Chg. C. Itoh & Co. Ltd.)
302 Central Bldg."

In answer we received the following telegram:

Plaintiff's Exhibit No. 10.

"A31EA AM 42 Blue

Md San Francisco Calif 1038 AM Mar 17 1920.

C Itoh and Co

Central Bldg Seattle Wash

Replying to your communication hundred tons thirty eight forties we regret this delay but we trying to get shipping instructions from our buyers East No doubt we will have same within day or so Try hold shipment at dock to save unnecessary expense.

KOCKOS BROS.

107 PM."

On the same day we received the following telegram:

Plaintiff's Exhibit No. 11.

"239 sfs 25 1229p

SA San Francisco Cal Mar 17 20

C. Itoh and Co.

Central Bldg Seattle

Ship hundred tons peanuts Kockos brothers Chicago Notify Natl Importing Trading Co Phone them They probably will change shipping instructions This satisfactory to us Advise.

KOCKOS BROS."

In compliance with the telegram we asked the National Importing & Trading Co. for shipping instructions. I had prior to this time delivered inspection permits to the National Importing & Trading Co. Three or four days later I saw in-

spection certificates received by the National Importing & Trading Company. About March 17 or 18, 1920, we received the following letter from them: [32]

Plaintiff's Exhibit No. 12.

"March 17, 1920.

C. Itoh & Co., Ltd.,
Central Bldg.,
Seattle.

Dear Sirs:

We wish to thank you for your letter of March 17, offering sixty five (65) barrels China Wood Oil, now spot Seattle. We will take this up with our eastern office, sending them copies of the Worstall test. We will hold the originals on file here to forward in case sale is made.

We further wish to confirm the writer's conversation with you today, in which we instructed you to ship one hundred (100) tons Chinese Shelled Peanuts, on which we have Chamber of Commerce certificates. You are to ship, notify National Importing & Trading Co., 30 No. Dearborn St., Chicago, Illinois, cars to go to Sibley Warehouse, Clarke Street Bridge.

Very truly yours,
NATIONAL IMPORTING & TRADING CO. INC.

A. H. DeYOUNG,
Vice-President."

AHD/AH.

I had seen the Chamber of Commerce certificates before I received this letter. I had a conversation

with Mr. DeYoung, manager of the Seattle office of the National Importing & Trading Company on or about the date I received the letter of March 17th and he said the nuts were very good and did not say that there was any objection to the peanuts or to the Chamber of Commerce certificates they had obtained with the peanuts. The following are copies of the Chamber of Commerce certificates:

Plaintiff's Exhibit No. 13–A.

"Seattle Chamber of Commerce and Commercial Club.

Foreign Trade Bureau.

Seattle, Washington, March 15, 1920.

Certificate No. 10555.

At the request of National Importing & Trading Co., Seattle, Wash., this Bureau has selected I. F. Laucks, Inc., to sample and inspect 1600 Bags shelled Peanuts Marked: Ex 'Eastern Victor' ITC #118

Stored at East Waterway Dock Kobe B/L 3, C. E. 5345, for account of National Importing & Trading Co.

_____,

Director Foreign Trade Bureau.

We have inspected the 1600 Bags Peanuts described above and certify: [33]

That the quality is

Chinese Shelled Peanuts Count 36–38.

Free from mold and vermin.

In sound merchantable condition.

These peanuts fair average quality, 1919 crop.

Containers in good condition.

Weight 100-lbs. per sack, net.

Date of Sampling —.

Per cent. Sampling —.

File Copy for C. Itoh.

Inspector, I. F. LAUCKS, INC.

By ————————.

We attest that the above signature is the true signature of the above-named I. F. Laucks, Inc.

————————

Director Foreign Trade Bureau.

Copy.

Plaintiff's Exhibit No. 13–B.

"Seattle Chamber of Commerce and Commercial Club.

Foreign Trade Bureau.

Seattle, Washington, March 13, 1920.

Certificate No. 10556.

"At the request of National Importing & Trading Co., Seattle, Wash., this Bureau has selected I. F. Laucks, Inc., to sample and inspect 560 Bags Peanuts Marked * * * Ex. Ex/ 'Eastern

Ocean.'

Stored at East Waterway Dock C. E 4822

(Deposition of R. A. Crandall.)

Kobe B/L 29, for account of National Importing & Trading Co.

_____,

Director Foreign Trade Bureau.

We have inspected the 560 Bags Peanuts described above and certify:

That the quality is Chinese shelled peanuts.

Count 38–40.

Free from mold and vermin.

In sound merchantable condition.

These peanuts fair average quality, 1919 crop.

Containers in good condition.

Weight 100 lbs. per sack, net.

Date of Sampling.

Inspector, I. F. LAUCKS, INC. [34]

Per cent. Sampling

By _____.

We attest that the above signature is the true signature of the above named I. F. Laucks, Inc.

_____,

Director of Foreign Trade Bureau.

Copy.

(Seal F. I. Laucks, Inc.)

to C. ITOH."

At the time I received this letter of March 17th from the National Importing & Trading Company I had no intimation that there was any objection to the nuts. Kockos Bros. had previously made a request for inspection of the peanuts through H. L. Hudson and Co. and at that time there was no objection from either Kockos Bros. or the National

Importing and Trading Co. to the peanuts or the inspection certificates. Shortly after receiving shipping instructions from the National Importing and Trading Co. we ordered the nuts shipped.

We sent the following request for weights to Jordan & Company:

Plaintiff's Exhibit No. 14.

March 17, 1920.

Jordan & Company,
Grand Trunk Dock,
Seattle, Washington.

Gentlemen:

We have given the Great Northern and East Waterway Dock shipping instructions on the following lots of peanuts:

1600 Bags shelled Peanuts ex 'Eastern Victor' Marked:

ITC
118
Seattle

400 Bags Shelled Peanuts ex 'Eastern Ocean' Marked: * * *

Will you please let us have weight certificates, in quadruplicate, on these two lots on net weight per sack basis.

Very truly yours,
C. ITOH & CO. LTD.,
By ————————."

The following is a letter we sent to East Waterway Dock & Warehouse Co. regarding the nuts. [35]

Plaintiff's Exhibit No. 15.

"March 17, 1920.

East Waterway Dock & Warehouse Co.,
Seattle, Washington.

Gentlemen:

S. S. 'Eastern Victor'
S. S. 'Eastern Ocean.'

Herewith handing you Mitsubishi's Delivery Order, without number, on 1600 Bags Chinese Shelled Peanuts ex S. S. 'Eastern Victor,' Kobe/Seattle B/L #3, marked:

<ITO>
118
Seattle

Also Rogers Brown & Co's. Delivery Order No. 1059 covering 400 Bags Shelled Peanuts ex 'Eastern Ocean,' Marked: * * *
together with copies of Rail Bills of Lading furnished to the Railroad Company upon which to load this shipment. Jordan & Company to weigh before loading.

Inasmuch as this shipment has been delayed we would appreciate it very much if you would kindly render all assistance possible in getting same moving.

All charges are to be taken care of by this office. Please render your bills in triplicate.

Very truly yours,
C. ITOH & CO. LTD.,
By ————————————."

We sent the following letter to W. F. Stokes regarding the nuts:

Plaintiff's Exhibit No. 16.

March 17, 20.

Mr. W. F. Stokes, Agent,
Great Northern Dock,
Seattle, Washington.

Dear Sir:

S. S. 'Eastern Victor.'
S. S. 'Eastern Ocean.'

We are herewith enclosing our Bills of Lading numbered 53 to 56, inclusive, covering 2000 bags of Chinese, Shelled peanuts ex 'Eastern Victor' and 'Eastern Ocean,' now at East Waterway Dock, consigned to our order/notify National Importing & Trading Company, c/o Sibley Warehouse, Clarke Street Bridge, Chicago. [36]

While each of these Bills of Lading are made out for a specified amount, it is immaterial to us as to the number of bags loaded in each car as long as you protect the minimum carload rate on each car. We are giving you this information for the reason that it will enable you to perhaps, utilize cars to a better advantage. You, of course, realize that the East Waterway Dock is located on the O. W. R. & N., which is at this time a direct competitor of yours, and we trust you will use every possible effort to get this shipment moving at once. Jordan & Company is to weigh shipment before loading.

No charges of any nature are to be advance against these shipments.

Very truly yours,

C. ITOH & CO. LTD.,

By ————————————.

ARC/MC.

Enc."

The nuts were weighed and then we prepared a draft for the purchase price and the weight certificate, Chamber of Commerce certificates and the Bills of lading were attached thereto and taken to the bank.

The following is a duplicate of the invoice accompanying the draft:

Plaintiff's Exhibit No. 17.

"C. ITOH & COMPANY, LTD.

Date March 22, 1920.

Sold to Kockos Bros.,
San Francisco, Cal.

S–14 P–112–117					
1600 Bags Chinese Shelled Peanuts 38/40 Count	Gross 162905#			at	
	Tare 2800#		160105#	12¢	$19212.60
ITC 118					
400 Bags Chinese Shelled peanuts 38/40 Count					
	Gross 40470#		39270#	12¢	4712.40
	Tare 1200#				
					$23925.00

We are attaching hereto the following:

Original and Duplicate of Railroad Bills of Lading numbered 53 to 56 inclusive, Great Northern Numbers 3151, 3152, 3153 and 3368. [37]

Weight Certificates, in duplicate, Copy of Seattle Chamber of Commerce Certificate of Inspection (Original delivered to National Importing & Trading Co.)

Draft #14, through Yokohama Specie Bank.

C. ITOH & COMPANY LTD.,
By N. NAKAMURA,
Assistant Manager."

The draft was drawn against Kockos Bros. for $23,925.00, computed according to the weights and the purchase price.

I then notified Kockos Bros. of the shipping and draft by the following letter:

Plaintiff's Exhibit No. 18.

March 27, 20.

Messrs. Kockos Bros.,
40 California Street,
San Francisco, California.

Gentlemen:

Referring to your purchase of November 28th covering one hundred tons forty count Chinese Shelled peanuts, also your telegram of March 17th instructing that these be shipped to Chicago to the National Importing & Trading Company:

We beg to advise that the entire lot has gone forward and we are drawing on you today through the Yokohama Specie Bank as per contract, col-

lection charges for your account, if any with all documents attached.

Very truly yours,
C. ITOH & CO., LTD.,
By ————————.

ARC/MC."

They declined to lift the draft.

About March 30, 1920, we received the following telegram from Kockos Bros:

Plaintiff's Exhibit No. 19.

"F Room 1, Lobby Central Bldg., Seattle, Wash.
Tel. Main 7281—Local 19.
Open 9 A. M. to 5 P. M. Closed Sunday.
A65EA An 64 Coll Blue via K
Md San Francisco Calif 6 PM Mar 30 1920.
Messrs C. Itoh and Co.
Seattle Wash. [38]

Received your documents We regret they show sixteen hundred bags Thirty six thirty eights should be thirty eight forties Buyers very technical now days therefore we must have deduction Peanuts must be exact count which we bought Furthermore Phone our broker H L Hudson Let them see lading date Have them wire us immediately five hundred sixty bags in order with contract Answer.

KOCKOS BROS.
510 PM."

We had received no intimation from Kockos Bros. that the count of 36/38 was unsatisfactory before this.

The draft on Kockos Bros. was protested. The following is a notice of protest which we received by mail:

Plaintiff's Exhibit No. 20.

"UNITED STATES OF AMERICA.

San Francisco, Cal., April 1st, 1920.

Sir:

Please take notice that a certain Sight Draft No. 14 dated Seattle Wash. March 27–1920, for $23,925.00 Dollars, Payable at sight drawn by C. Itoh and Company Ltd. on Messrs Kockos Bros. 40 California St. San Francisco in favor of The Yokohama Specie Bank Ltd. was this day protested by me for the non-payment thereof, and the holders look to you for the payment thereof, together with all costs, charges, interests, expenses and damages already accrued or that may hereafter accrue thereon by reason of the non-payment of said Sight Draft.

Very respectfully yours, etc.,

[Seal] JAMES MASON,

Notary Public in and for the City and County of San Francisco, State of California.

To C. Itoh and Company, Ltd.,

Seattle, Washington."

We replied to Kockos Brothers' telegram on April 1st, 1920, as follows:

Plaintiff's Exhibit No. 21.

"Seattle, Wash. April 1, 1920.

Kockos Bros.,
40 California St.,
San Francisco, Cal.

Exchange wires with reference to your purchase of hundred tons forty count peanuts no good reason why we should make any reduction in invoice covering these nuts you had inspected by several different parties and acknowledged acceptance when you instructed us to ship to Chicago We understand that the present [39] difficulty has nothing to do with grade of nuts in question Hudson and Company may see bill lading.

C. ITOH & CO., LTD.,

When we said in the telegram "You had these nuts inspected by several different parties," we meant the National Importing and Trading Co., and H. L. Hudson and Co., as we had delivered the certificates to H. L. Hudson and Co.

About April 6, 1920, we received the following telegram in reply from Kockos Bros:

Plaintiff's Exhibit No. 22.

"A39EA AM 86 Coll Blue Via K
Md San Francisco Calif 1053 AM April 6 1920.
C Itoh and Co
Central Bldg Seattle Wash

Your wire April first not satisfactory We have purchased from you average Chamber Commerce certificate to be final as to count and quality Your

certificate shows thirty six thirty eight therefore cannot accept We understand goods rolling Chicago Would like to help you out all we can in this matter but you see your position You have not given us documents to comply with your contract We will not hold ourselves responsible on this shipment on account you failing to comply with your contracts.

KOCKOS BROS.

125 PM"

About April 9, 1920, we replied to this telegram as follows:

Plaintiff's Exhibit No. 23.

"Seattle, Wash. April 9, 1920.

Messrs. Kockos Bros.,
40 California St.,
San Francisco, Cal.

Your wire sixth referring your purchase sixteen hundred bags peanuts inasmuch as you were aware some six or eight days before giving us instructions that peanuts were of a higher count than thirty eight forty we feel that the matter of price should be submitted to arbitration you to name one arbitrator we one and the two one making arbitration board of three Will you name your arbitrator.

C. ITOH & CO. LTD.

(Paid, Chg. C. Itoh & Co. Ltd.)
302 Central Bldg."

Although we suggested that the matter be submitted to arbitration they did not express their

willingness to do so. On April 13, 1920, we sent the following telegram to Kockos Bros. outlining our position: [40]

Plaintiff's Exhibit No. 24.

"B224EA 95 Blue 1170.

F Seattle was 535 P 13.

Kockos Bros.,

40 California St., San Francisco, Calif.

Our position is that contract November twenty-eighth, nineteen nineteen, for one hundred tons Chinese peanuts have been fully performed by us, and in addition that both yourselves and your buyer National Importing Trading Company had inspected and passed peanuts previous to giving us shipping instructions. Stop Our telegraphic offer April ninth of arbitration has been ignored by you. Stop Therefore unless you promptly honor drafts we will have no alternative except to dispose of the peanuts for your account and bring action against you for all loss sustained. Must have reply within forty eight hours.

C ITOH AND CO LTD."

On or about April 15th we received the following reply from Kockos Brothers:

Plaintiff's Exhibit No. 25.

"19 SF 74 NL

San Francisco, Calif., 714

Messrs. C. Itoh & Co.,

Seattle, Wash.

Your wire thirteenth received. As per previous communications we have been able ready and will-

(Deposition of R. A. Crandall.)

ing to confirm our contract and accept documents according to terms of contract but you have absolutely failed to comply as your certificate self explains. Stop We understand from the documents you have presented us there was a portion forties and if there is present documents immediately and if they are in order we will take up draft at once. KOCKOS BROS."

The peanuts described in the foregoing telegrams were the same ones for which we had furnished inspection permits to H. L. Hudson & Co. and to National Importing & Trading Co. and on which the National Importing & Trading Co. had received Chamber of Commerce certificates. To the best of my knowledge duplicates of the Chamber of Commerce certificates delivered to the National Importing and Trading Co. accompanied the draft drawn on Kockos Bros.

The draft for $23,925.00 was never paid by Kockos Bros. nor have they paid for the peanuts.

After the last telegram to Kockos Bros., the peanuts had arrived in Chicago, and the Railroad Co. asked for immediate disposition of them, and we advised the Railroad Co. to put the peanuts in storage there. The peanuts had been forwarded to Chicago by us in accordance with the shipping instructions received.

We tried to dispose of the peanuts and asked A. U. Pinkham & Co. and W. R. Grace & Co., both of Seattle, for bids. We were not able to dispose of them immediately. During the period from March 15th to May 20th, 1920, the market

(Deposition of R. A. Crandall.)

price of peanuts was falling. [41] I was familiar with the daily market price of peanuts. The peanuts were stored in the Chicago Cold Storage Company Warehouse and sold May 20, 1920, to W. R. Grace & Co. We received a gross price of $19,528.86 or $9.75 per hundred pounds. We had to pay $3432.11 freight charges. The following four freight bills cover the freight charges to Chicago:

Plaintiff's Exhibit No. 26.

"To UNITED STATES RAILROAD ADMINISTRATION, Director General of Railroads, Chicago, Burlington & Quincy Railroad, Dr., for charges on articles Transported:
CHICAGO, ILL. (Cor. Canal and Harrison Sts.), STATION.
4/27/20

Consignee CHICAGO COLD STORAGE CO. Freight Bill No. 70705
Destination 16th & Indiana.
Route GN M TER CBQ CHGO ST CHAS AIR LINE

Way-Billed from	Way-Bill date and No.	Full name of shipper	Car initials & No.
GN SEATTLE DOCKS WN	F 1191 3/19	EX ORIENT	202106 CP
Point and Date of shipment	Connecting Line	Previous Way-Bill	
DL BL	Preference 3152	References ITCH EX SS VICTOR KOBE BL3 EWWDK & WCO	

Number of packages, articles and marks	Weight	Rate	Freight	Advances
M 500 BAGS CHINESE SHELLED PEANUTS				
ITC	51460	150	771 90	
118			23 16	WAR TAX
NOT 4/5 1 C/L 500 BAGS			78 00	WAR TAX
REL 4/21 NOT IN BOND CE 5345			2 34	WAR TAX
EWWD & W SEALS 2089/90			5 00	R/C CHGO
			15	WAR TAX
89460 38000 51460				
Grand Total			880 55	

C. B. & Q. R. R.
PAID
May 5 1920
F. ARMSTRONG, AGT.
By S., Cashier
Chicago, Ill. [42]

To UNITED STATES RAILROAD ADMINISTRATION, Director General of Railroads, Chicago, Burlington & Quincy Railroad, Dr., for charges on articles Transported:

CHICAGO, ILL. (Cor. Canal and Harrison Sts.), STATION.

4/27/20

Consignee CHICAGO COLD STORAGE Co. Freight Bill No. 72723

Destination 16th & Indiana.

Route GN M TER CBQ CHGO. ST CHAS AIR LINE

Way-Billed from	Way-Bill date	Full name of shipper EX	Car initials & No.
GN SEATTLE DOCKS WN	F 1547 3.26	ORIENT DK BL	90806 L & N

Previous Way-Bill References	Original car initials and No.
3368 ITOH CO E OCEAN EWW O & W JORDAN TERML 2	DKES DK EX

Number of packages, articles and marks	Weight	Rate	Freight	Advances
M 400 BAGS CHINESE	40180	150	602 70	
SHELLED PEANUTS				18 08 WAR TAX
* * *				
NOT 4/19				18 00 C/S CHGO
REL 4/27				54 WAR TAX
38/40				5 00 R/C CHGO
1 C/L 400 BAGS				15 WAR TAX
GRAND TOTAL				644 47

CLEARED FROM CUSTOMS 2 SLACKERS 30 LB EACH
EWWD & W SEALS 1229/30

C. B. & Q. R. R.
PAID
May 5 1920
F. ARMSTRONG, AGT
By S., Cashier
Chicago, Ill. [43]

To UNITED STATES RAILROAD ADMINISTRATION, Director General of Railroads, Chicago, Burlington & Quincy Railroad, Dr., for charges on articles Transported:

CHICAGO, ILL. (Cor. Canal and Harrison Sts.), STATION.

4/28/20

Consignee CHICAGO COLD STORAGE CO. Freight Bill No. 71311

Destination 16th & Indiana.

Route GN MPL CBQ CHGO ST CHAS AIR LINE

Way-Billed from	Way-Bill date	Full name of shipper	Car initials & No.
GN SEATTLE DOCKS WN	F 1190 3/19	EX ORIENT DK BL	3151 NYC 246413

Previous Way-Bill References EX S S E VICTOR KOBE

Original Car initials and No. BL3EWWDK

Number of packages, articles and marks	Weight	Rate	Freight	Advances
M 600 BAGS CHINESE SHELLED PEANUTS ITC	61092	150	916 38	
NOT 4/12 1 CL 118 600 BAGS			27 49	WAR TAX
REL 4/21			48 00	C/S CHGO
			1 44	WAR TAX
NOT IN BOND CE 5345			5 00	R/C CHGO
EWW D & W SEALS 2093/4			15	WAR TAX
Grand Total			998 46	

C. B. & Q. R. R.
PAID
May 5 1920
F. ARMSTRONG, AGT.
By S., Cashier
Chicago, Ill. [44]

"To UNITED STATES RAILROAD ADMINISTRATION, Director General of Railroads, Chicago, Burlington & Quincy Railroad, Dr., for charges on articles Transported:
CHICAGO, ILL. (Cor. Canal and Harrison Sts.), STATION.
4/27/20

Consignee CHICAGO COLD STORAGE CO. Freight Bill No. 71310
Destination 16th & Indiana.
Route GN MPLS CBQ CHGO ST CHAS AIR LINE

Way-Billed from	Way-Bill date	Full name of shipper	Car initials & No.
GN SEATTLE DOCKS WN	F 1189 3/19	ORIENT DK BL	3153 152636

Previous Way-Bill References: ITCH EX SS E VICTOR KOBE BL 3

Number of packages, articles and marks	Weight	Rate	Freight	Advances
M 500 BAGS CHINESE SHELLED PEANUTS ITC 118	50877	150	763 15	
NOT 4/12				22 89 WAR TAX
REL 4/27				48 00 C/S CHGO
				1 44 WAR TAX
NOT IN BOND CE 5345 EWW D & W SEALS 2091/2				5 00 R/C CHGO
				15 WAR TAX
Grand Total			840 63	

C. B. & Q. R. R.
PAID
May 5, 1920
F. ARMSTRONG, AGT.
By S., Cashier
Chicago, Ill."

The storage charges at Chicago were approximately $270.00. Weighing charges $46.72, which was a re-weighing requested by the purchaser through W. R. Grace & Co. The sampling charges were one dollar and some odd cents. All the charges were incidental to the sale.

We had to pay 3% commission on the sale or $185.87. It was paid to W. R. Grace & Co. It is the customary charge where the sale is made through two firms or two branches of the same firm. We received net from W. R. Grace & Co. for the sale, $15,183.38. The following is an account sales sent with the remittance: [45]

Plaintiff's Exhibit No. 27.

"No. 9.

Account Sales of 1999 Bags Peanuts.

Received per Cars # N. Y. C. 245413; 152636 C. P.; 202106 L & N 90806.

For account and risk of Seattle House.

399 Bags sold to Durand & Kasper		
Weight,—Gross—Tare—Net		
40878 798 40080		
at $9.75 per 100#	3907.80	
1200 Bags sold to Reid Murdock & Co.		
Weight—Gross—Tare—Net		
122881 2400 120481		
at $9.75 per 100#	11746.90	
400 Bags Sold to Rogers Brown & Co.		
Weight—Gross—Tare—Net		
40355 600 39735		
at $9.75 per 100#	3874.16	
Value May 20, 1920		19528.86

CHARGES.

C. P.	202106	$880.55		
Freight N. Y. C.	245413	$998.46		
C. P.	152636	$840.63		
L & N	90806	$712.47	3432.11	
Weighing			46.72	
Storage and Sampling			280.78	
Commission $19528.86 at 3%			885.87	4345.48
Net Proceeds, Value June 15, 1920,				15183.38

Chicago

W. R. GRACE & CO.

Seattle, Washington.

June 22, 1920.

Received $15183.38 in settlement of above.

C. ITOH & CO.

By ——————————."

The following are the bills we received from the Chicago Cold Storage Warehouse Company for storage, sampling, weighing and freight: [46]

Plaintiff's Exhibit No. 28.

"CHICAGO COLD STORAGE WAREHOUSE CO.

Chicago, Ill., May 20th, 1920.

In Account with C. Itah & Co.,
Seattle, Wash.

Accrued charges—Peanuts—Lots #486–487–489.

May 7th	Storage #	387	.90
May 18th	Storage	1181	
(Balance unpaid)			3.05
May 21st	Storage	1422	271.83
May 4th	Freight Car	152636	840.63
May 4th	Freight Car	245413	998.46
May 4th	Freight Car	202106	880.55
			2,995.42

Received Payment, May 24, 1920.
CHICAGO COLD STORAGE WAREHOUSE CO.
Per V.

Cashiers Pay & Charge
Windsor Department
Lot No. ——.
Initialed WECM"

"CHICAGO COLD STORAGE WAREHOUSE CO.

Chicago, 5/7/20.

C. Itah & Co.,
Seattle, Washington.

Order No. A–8632 Bill No. A–387
Del'd To A. U. Pinkham & Co.

Lot: Pkgs:
488 400
489 499 Sacks Peanuts
486 500
487 600

Drew samples only charges for 1 man 1½ hours at 60¢ per .....90¢"

[47]

"CHICAGO COLD STORAGE WAREHOUSE CO.

Chicago, 5/18/20.

C. Itah & Co.,
Seattle, Washington.

Order No. A–8880. Bill No. A–1181. Del'd to Rogers Brown & Co. NTFY. Brundage Bros. Co. Via Pittsburg, Pa.

Car No. GT 25252 Seals A–861/62.

Lot	Pkgs.	Article	Weight	From	To	Mos.	Rate.	Amount.	Total.
488	400	Bags Peanuts	39796	5/5/20	5/17/20	1	17	67.65	
		Charge for 4 hours labor for weighing.....					60	2.40	
		Charge for 10 lbs. of paper.....					10	1.00	71.05"

(Deposition of R. A. Crandall.)

"CHICAGO COLD STORAGE WAREHOUSE CO.

Chicago, 5/21/20.

C. Itah & Company,

Seattle, Washington.

Order No. Cards Nill No. A 1422.

Lot	Pkgs.	Article	Weight	From	To	Mos.	Rate.	Amount.	Total.
486	500	Sacks peanuts	50000	5/4/20	6/4/20				
487	600	" "	60000	5/4/20	6/4/20				
489	499	" "	49900	5/4/20	6/4/20				
			159900			1	17	271.83"	

In my opinion the price of $9.75 per hundred pounds was the fair market price or value of the peanuts in Chicago at the time of sale.

The notation 36/38 and 38/40 means the number of the peanuts to the ounce. The 36/38's are slightly larger than the 38/40's. The 36/38's are the better commodity, being larger, and commands a higher price. [48]

Cross-examination.

I had nothing to do with the storage company in Chicago nor with the commission. I received the check from W. R. Grace & Co. and had something to do with the accounting.

I do not know personally whether samples were taken or not. I do know personally that the various bills were paid.

I personally made out the invoice of March 27, 1920, and knew at that time the peanuts were 36/38. I could not say now why the original did not specify that the peanuts were 36/38. I first ascertained that they were 36/38's during the first

(Deposition of R. A. Crandall.)

of March. It appears from the communications to Kockos Brothers that they were 38/40's.

The railroad company stored the goods in Chicago to the shipper's account. Only 400 bags of 38/40 count were ever tendered to Kockos Bros. I never gave Kockos Bros. any notice of the time and place of sale of these peanuts in Chicago, nor the name of the broker. I do not charge any fraud in the Chamber of Commerce certificate.

Kockos Bros. offered to receive and pay for the 400 bags of 38/40's but the offer was refused. They were notified to pay for the entire contract or pay damages.

Redirect Examination.

The freight bills were stamped and paid when I received them.

When I received the account sales from W. R. Grace & Co. I checked up and satisfied myself that all the deductions were correct. When the drafts were sent to Kockos Bros. with the Chamber of Commerce certificates procured by the National Importing and Trading Co., the certificates showed the 1600 bags were 36/38 count. When the drafts were forwarded to Kockos Bros. at San Francisco, there was no withholding of the larger count of peanuts in the 1600 bag lot. The Chamber of Commerce certificates attached to the draft showed exactly what the count was, and was available for the examination of the defendants when they examined the draft and the documents attached to it.

(Deposition of R. A. Crandall.)

On April 6th, 1920, Kockos Bros. refused to hold themselves responsible in any way on the shipment and we notified them April [49] 13, 1920, that we would sell for their account and sue them for any loss.

Deposition of George B. Graham, for Plaintiff.

GEORGE B. GRAHAM, a witness on behalf of plaintiff, being first duly sworn, deposed and said:

I am a member of the firm of O'Callahan-Graham & Co., importers and brokers, located at Seattle, Washington. I was a member of that firm in March 1920.

We had sold a good many peanuts as brokers for others, buy and sell on our own account and inspect peanuts for many people.

We were requested on March 10, 1920, by Kockos Bros. to inspect a hundred ton lot of peanuts for them. We received the sampling permit from the Hudson Co., customs brokers, and made the inspection. The peanuts were inspected in two lots, 1600 bags Ex "Eastern Victor" marked ITC in a diamond and 560 bags marked three stars Ex "Eastern Ocean." After the inspection we sent the following telegram to Kockos Bros.:

Plaintiff's Exhibit No. 29.

"March 10, 1920.

Kockos Bros.
46 California St.,
San Francisco, Cal.

Examined to-day two lots China shelled peanuts

(Deposition of George B. Graham.)

totaling hundred eight tons per your wire fifth Itoh shippers Sixteen hundred bags Ex Eastern Victor marked diamond ITC actual count thirty-seven sound clean evenly graded free from mold dirt or worms Excellent condition Exceptionally good delivery on forty count Contract lot five hundred sixty sacks Ex Eastern Ocean marked three stars Actual count thirty-nine clean free from worms webs or dirt Average two nuts slightly moldy out of six hundred twenty-five May not increase but don't like even slight trace Advise if want samples.

Collect.

O'CALLAHAN-GRAHAM CO."

The telegram is a true report of our inspection. We found the 1600 bags as shown by this telegram to actually contain a count of 37.

I considered the count of thirty-seven good delivery on a 40 count contract because they were larger than called for by the contract. Up to that time I never [50] heard of rejection of peanuts because larger than called for. Since then I have heard of such rejection. The 37 count is one peanut per ounce larger than the 38/40. I never heard of objections to larger nuts except when the market was falling.

We received the following letter from Kockos Bros. in reply to our telegram:

(Deposition of George B. Graham.)

Plaintiff's Exhibit No. 30.

"San Francisco, U. S. A., March 12, 1920.

Messrs. O'Callahan-Graham Co.,

Seattle, Wash.

Gentlemen:

We have received your wire of March 10th giving us full information in regard to inspection of 100 tons PEANUTS to ITOH & COMPANY which information was very clear to us and we thank you for your prompt inspection and answer.

We will communicate with you from time to time to give you some of this business, and in the meantime if you are interested in buying anything, kindly let us hear from you.

We remain,

Yours very truly,

KOCKOS BROS.,

By ANDREW KOCKOS,

AK:MD. Import & Export Dept."

We were requested by and received compensation for our inspection from Kockos Bros. and we were never advised by them that they objected to the peanuts because of the count. We have no interest in the controversy. I was familiar with the peanut market between March 15 and June 1, 1920. It was a falling market.

Cross-examination.

On occasions inspectors will disagree as to count. I would not rely on the Chamber of Commerce certificate as to count. I say this because sometimes their certificates are wrong. [51]

(Deposition of George B. Graham.)

I am familiar with the sale of peanuts by count.

I am positive C. Itoh & Co. knew nothing of my work for Kockos Bros. during the month of March, 1920.

I am not sure just when the decline began in the market.

Deposition of Arthur U. Pinkham, for Plaintiff.

ARTHUR U. PINKHAM, a witness for plaintiff, first duly sworn, deposed and said:

I am in the firm of A. U. Pinkham & Co., Seattle, import and export brokers. I was so engaged in 1919 and 1920. We handled shelled peanuts and oriental products in general. Seattle is the principal office of the firm with a branch in Chicago and also in San Francisco opened about May, 1920.

I sent a copy of the contract in this case, together with a letter of confirmation and letter of transmittal heretofore introduced as Plaintiff's Exhibits 1, 2 and 3.

The contract calls for 38/40 count.

The number 36/38, 38/40 refers to the number of peanuts per ounce. The 36/38's are the larger and always bring a higher price. A 38/40 is a good delivery against 40's.

In March, April and May, 1920, I was handling peanuts as a broker and was familiar with the market price. Between the months of March and June 1, 1920, the market was steadily declining rapidly.

The market price of 36/38's in Seattle in March

(Deposition of Arthur U. Pinkham.)

1920 was for Chinese shelled peanuts, f. a. q. f. o. b. cars Seattle, duty paid, about $10.75 per hundred. 38/40's about 25 cents per hundred less. My records on 38/40's is as follows: March 29, $10.50 f. o. b. Coast, Apr. 1, $10, Apr. 19, $9.25. It was about $9.50 June 1st.

The price in Chicago is usually the price on the Coast plus [52] all charges necessary to get the nuts to Chicago. We tried to sell the peanuts in controversy here, through our Chicago office, but were unsuccessful.

I would say $9.75 per hundred in Chicago was a fair market price May 20, 1920, based on the f. o. b. Coast price of $9.75 according to my records.

Cross-examination.

I know different sizes of peanuts are used for different purposes and in buying them a merchant may have a certain size in mind.

I do not know when the market decline began, the big slump came in April. There seemed to be a gradual decline from March on.

Deposition of L. W. Eilertsen, for Plaintiff.

L. W. EILERTSEN, a witness for plaintiff, being first duly sworn, deposed and said:

I am the treasurer of I. F. Laucks, who do general inspection and medical work. I was so employed in March, 1920. At that time we inspected 100 tons of Chinese peanuts for the National Importing & Trading Co. and issued Chamber of Commerce Certificate at the request of Mr. Olmstead

(Deposition of L. W. Eilertsen.)

of that company. Five hundred and sixty bags were marked three stars, 1600 bags marked ITC in a diamond. We delivered the Chamber of Commerce certificate to the National Importing & Trading Co. The copies of the certificates sent to them are the ones you previously introduced as Exhibits 13–A and 13–B and were retained in our files from the date of issuance. The copies were made at the same time as the originals. The information contained in the certificates is correct.

The following is a copy of the original card which shows the making of the inspection: [53]

"Commodity: 1600 bgs Peanuts—No. 10555.
Grade Chinese Shelled."

"Less than ——% Split, Spotted, Discolored and Foreign.

Count 36–38.

Mold No.——. Vermin No.——.

Worms ——. Weavils ——.

In Sound Merchantable condition—Yes.

Years—Crop 1919.

F. A. Q.—Yes.

Remarks: 100# Bgs.
I T C
#118

(Deposition of L. W. Eilertsen.)

(Reverse side of Card:)

Wn.		Sn.	T.
10 oz.			
111	373	6	379
111	362	9	371
111	367	10	377

3)1127

37.6

Wn.		Sn.	T.
10 oz.	363	12	375
—	365	10	375
—	368	8	376

3)1126(37.6"

The mark I T C in diamond with 118 below it identifies the lot. The number 10555 is the number of the inspection certificate issued.

The 37.6 indicates the number of nuts per ounce. It is larger than the 38/40's and usually brings a higher price. [54]

The Chamber of Commerce and Commercial Club have a committee of men pass upon the sample used by the inspector and check up his work and the certificates are signed by the directors of the Chamber of Commerce and Commercial Club.

(Deposition of L. W. Eilertsen.)

Cross-examination.

I did the grading on the 560 bag lot. Mr. Scott did that on the 1600 bag lot. The inspection was at the instance and request of the National Importing & Trading Co.

Deposition of George A. Jensen, for Plaintiff.

GEORGE A. JENSEN, a witness for plaintiff, being first duly sworn, deposed and said:

I am and was in March, April, May and June, 1920, connected with the Seattle office of W. R. Grace & Co., Importers and Exporters. They had a Chicago office in 1920.

As manager of the Merchandise Department I had charge of the selling of the 100 tons of peanuts in controversy for C. Itoh & Co. We were requested to sell them at the best price obtainable and they were sold through our Chicago office. The collection was made and $15,183.38 turned over to C. Itoh & Co. for which we got receipt. The money was paid June 22, 1920. We sold 400 bags May 19; 1200 bags May 29; 399 bags May 29, 1920. All were sold at $9.75 per hundred net, weights Chicago.

We deducted $4,345.48 for freight charges, weighing, storage, sampling and commission. It is correct.

I was familiar with the peanut market at that period, having sold large quantities of peanuts during 1920. Between March 15 and May 29, 1920, the market was falling. The price obtained

(Deposition of G. A. Pande.)

for these peanuts was a fair price. We sold the peanuts at the best price we could get. [55]

Deposition of G. A. Pande, for Plaintiff.

G. A. PANDE, a witness for plaintiff, being first duly sworn, deposed and said:

I am now and was in March, April, May and June, 1920, Manager of the Northwest Trading Company, general importers and exporters.

I was familiar with the peanut market in 1920.

A 36/38 peanuts is larger than 38/40 and is slightly higher in price.

We got an offer from Hongkong April 3, 1920, of $10.75 per hundred c. i. f. for 38/40 for a 100 ton lot. We received an offer on May 20 for 100 tons 38/40 peanuts of $6.45 c. i. f. The market was declining between March 15 and June 1, 1920. I think $9.75 received for those peanuts when sold in Chicago was the top price for that day.

Cross-examination.

36/38 is not as common a grade as 38/40 in Chinese yellow peanuts in this market. The greater amount of sales in this district are 38/40.

Peanuts are bought by the count according to the particular purpose for which intended. The market in March and April 1920 was about as good for 36/38's as 38/40's.

Redirect Examination.

The Northwest Trading Company had offices all over the United States and the Orient and was closely in touch with the market.

(Deposition of Arthur E. Campbell.)

A 37.6 peanut is so near a 38/40 that there is no material difference. A peanut averaging 38 count would be classed as a 38/40. [56]

Deposition of Arthur E. Campbell, for Plaintiff.

ARTHUR E. CAMPBELL, a witness for plaintiff, first duly sworn, deposed and said:

I am claim adjuster for the Hartford Accident & Indemnity Company. In the period from March to June, 1920, I was connected with A. U. Pinkham & Company, Importers and Exporters.

I was a salesman in the Seattle office and had charge of peanut sales.

On June 1st, 1920, I became the San Francisco Manager for the same firm. I was familiar with the peanut market during this period.

The 36/38 peanut was about 25 cents per hundred higher than 38/40's during this period.

I do not believe there is any difference in the utility in the trade between 36/38's and 38/40's. They can be put to practically the same uses.

The difference is between the large sizes 28/30's and 30/32's and the small 36/38's and 38/40's. A premium is paid for the larger nuts.

I kept track of the peanut market between March 15 and June 1, 1920, and tabulated them. There was a falling market. I prepared a chart twice a week, and left it in the San Francisco office. The market declined steadily from the latter part of January, 1920, to June, 1920, with a slight rise in February, 1920. It was a rapid de-

(Deposition of Arthur E. Campbell.)

cline. The peak of the prices in February 1920 was about 12½ cents per pound, duty paid, f. o. b. Pacific Coast. It declined steadily to about 8 cents June 1, 1920. The 30/32's were selling the latter part of January 1920 at 13¾ to 14 cents per pound and declined steadily to June 1st, to 9½ cents, all prices duty paid f. o. b. cars Pacific Coast, net reweights. In Chicago the price would be the same plus freight and handling charges. [57]

We tried to sell the peanuts in this case after Kockos Bros. refused them. We offered them to our Chicago office first at 10½ cents, duty paid, f. o. b. cars, Seattle about March 28th or 29th, 1920. They could not sell at that price so we offered them at 10 cents about April 1, 1920. Heavy arrivals from the Orient flooded the market. We made special efforts to dispose of these peanuts but were unable to do so. The price of $9.75 per hundred obtained for these peanuts in Chicago was in my opinion a very very good price.

Cross-examination.

The differential of 25 cents between 36/38's and 38/40's is the price demanded by the owners of the peanuts.

I believe the apex of the market on 36/38's and 38/40's was January 13, 1920.

Deposition of Adrian H. De Young, for Plaintiff.

ADRIAN H. DE YOUNG, a witness on behalf of plaintiff, first duly sworn, testified by deposition as follows:

I am 30 years old; live in Chicago and am District Manager of De Young & Co. I am in the Oriental import and export business; have been engaged in the business for several years. I was in Seattle in charge of the Seattle office of the National Importing & Trading Company for two years. I remember a contract between the N. I. & T. Co. and Kockos Bros. for one hundred tons of peanuts. In March 1920, the Chicago office of the N. I. & T. Co. told us to inspect the shipment. Kockos Bros. notified us that Itoh & Co. would give us the inspection order. We turned the order over to the Chamber of Commerce who made the inspection. I remember there were two lots, the smaller lot counted 38/40, and the balance 36/38 to the ounce. The nuts were in good condition, free from foreign matter or bugs [58] of any kind, neither were they rancid nor did they carry an excessive amount of splits. I am familiar with the trade custom throughout the United States with regard to peanuts. When a contract calls for 40 count any peanut that is equal to 40 nuts per ounce or a larger sized peanut which would count less than 40 to the ounce would be a good delivery under such a contract according to trade custom.

(Deposition of Adrian H. De Young.)

I always keep myself familiar with the market conditions in the peanut business. I did all the buying and selling for the company while in charge of the Seattle office.

Between March 1st and June 1st, 1920, the peanut market was constantly falling. In March 1920 I do not think the price f. o. b. cars Seattle for 36/38 or 38/40 peanuts was over ten cents. A month or so earlier they had been as high as 12 cents. There was not over a quarter of a cent difference between 36/38 and 38/40 peanuts. The 36/38 being the higher. Between March and May 1920 I could say the price fell a cent and a half or maybe two cents per pound. In Chicago the price is higher than in Seattle due to the freight and possible fluctuations due to local conditions. The National Importing & Trading Company were taken over by a committee of creditors in May, 1920, and were adjudged bankrupt January 1921. [59]

Testimony of M. J. Collum, for Plaintiff.

M. J. COLLUM, a witness sworn on behalf of plaintiff, testified as follows:

I am in the importing and exporting business in San Francisco. I have been in that business for eleven years. I am vice-president of the National Mercantile Company. I have been with that firm since November 1921. Prior to that I was second vice-president of the S. L. Jones & Co. in San Francisco. I have handled peanuts very extensively ever since I have been in the import busi-

(Testimony of M. J. Collum.)

ness. I have bought and sold Chinese shelled peanuts extensively in this and other markets. A 38–40 count means an average of 38 to 40 peanuts to the ounce. A 36–38 count means 36 to 38 peanuts to the ounce, etc. There is very little difference between 38–40 and 36–38, this can hardly be detected except by actually counting them. There is practically no perceptible difference to the eye between the two. The only way to determine the difference is by an actual count of the kernels.

Samples of 36/38 count, marked No. 1, and samples of 38/40 count, marked No. 2, were introduced by the plaintiff, samples of each count being in separate boxes, and both boxes were passed to the jury and examined by the jurors.

Mr. BROWNSTONE.—In the contract calling for a 40 count average, what would you consider, or what would be considered in the trade a good delivery under such a contract?

The WITNESS.—The peanuts must not exceed 40 peanuts to the ounce.

Mr. BROWNSTONE.—That is, would you say that it must be at least 40 to the ounce, or less?

Mr. PARTRIDGE.—I will object to that, if your Honor please, on the ground that it is—

Mr. BROWNSTONE.—I will withdraw the question.

Mr. BROWNSTONE.—Would you say a 36/38—

The COURT.—Just let him explain that count.

Mr. BROWNSTONE.—All right.

(Testimony of M. J. Collum.)

The COURT.—Q. In a contract calling for a 40 count, [60] what would be recognized as a delivery in the trade?

The WITNESS.—They must not exceed 40 to the count.

The COURT.—Q. You mean by that that there might be 36?

The WITNESS.—Yes. You see the idea, your Honor, is to do away with the possibilities of rejection of a large sized count. In other words, if the peanuts run over 40 they have a cause for rejection.

Mr. PARTRIDGE.—I move to strike out all that evidence upon the ground it isn't admissible to show or explain the terms of a written contract.

The COURT.—Overruled.

Mr. PARTRIDGE.—May we have an exception?

The COURT.—An exception, yes.

EXCEPTION No. 1.

The WITNESS.—(Continuing.) I would say a 38–40 or a 36–38 count would be a good delivery under a contract calling for a 40 count average. Such is the general understanding of the trade. We prefer the 36/38 because it is a better peanut.

Mr. BROWNSTONE.—Q. Well then it is generally understood in the trade that a delivery under a contract such as this, of a 36–38, is a delivery under the contract?

The WITNESS.—What is the question, again?

(Question repeated by reporter.)

Mr. PARTRIDGE.—I will object to that upon

(Testimony of M. J. Collum.)

the ground that evidence of custom is not admissible to show or to vary the terms of a written contract.

The COURT.—Overruled.

Mr. PARTRIDGE.—May we have an exception?

The COURT.—An exception, yes.

EXCEPTION No. 2.

The WITNESS.—Yes, it is. [61]

The WITNESS.—(Continuing.) The market for Chinese shelled peanuts was declining in February and March into April and I think then remained stationary during April and May. I think a fair market price for Chinese shelled peanuts on 1600 bags of 36/38's and 400 bags of 38–40's, being 100 tons, on May 20 in Chicago would be about $9.75 or $10.00 per hundred.

Cross-examination.

In my opinion the market price on the Pacific Coast in May was about 8½ to 8¾ cents. The freight rate to Chicago was about $1.25 per hundred. I do not know what the market price was in February, 1920, nor in Seattle, March 2, 1920, nor March 13 or 15, 1920, nor March 30, 1920, nor in Chicago April 22, 1920. They were worth more on March 2 and March 15, 1920, than on May 22, but I do not know how much more. I know that certain sized peanuts are used for some purposes and another size for other purposes.

Redirect Examination.

Generally speaking, a 36–38 peanut can be used for any purpose a 38–40 peanut can be used for.

Testimony of H. W. Seaman, for Plaintiff.

H. W. SEAMAN, witness sworn on behalf of plaintiff, testified as follows:

I have been in the importing business for four years in the Oriental import department of W. R. Grace & Co. I handle many thousand of tons of peanuts and am familiar generally with the prices of Chinese shelled peanuts during the year 1920 on the Pacific Coast. The market price began to decline, I think, in February, 1920, and kept declining until May. I can't tell accurately, but I think during the latter part of May, 1920, the price on the Pacific Coast was between 7 and 8 cents. The Chicago market is relative to the coast market, the difference being that the Chicago market is higher by the differential in freight from here to Chicago. If the market were six cents in California, for example, in Chicago it would be six cents plus the cost of hauling the goods to Chicago. I am familiar with the various counts of peanuts. It is generally accepted and understood [62] in the trade that a delivery of a lesser count is good under a contract calling for a 40 count.

Cross-examination.

I know there are uses for smaller sized peanuts which larger ones will not fill but a 36–38 count can be used for any purpose a 38–40 can be used for, because it is such a close size to it. A 37-count delivery is good under a 40-count contract. I do not know accurately the market price in March, 1920; it was about 8¼ to 9 cents March 2d. The market was gradually declining.

Testimony of Arthur Rude, for Plaintiff.

ARTHUR RUDE, a witness sworn on behalf of plaintiff, testified as follows:

I have been in the importing and exporting business for six years, formerly as vice-president and manager of Nuzaki Bros., Incorporated, now for myself. I am familiar with the prices of Chinese peanuts in 1920, having handled roughly over 100,000 bags. The market was declining rapidly from about the 10th of February to about May 1st. In May, 1920, I would say roughly the price on 100 tons of 36–38 or 38–40 count peanuts on the Pacific Coast was about 7½ or 7¾ cents. In Chicago it would be about $1.75 per hundred pounds more due to freight. It is generally understood in the trade that a delivery of 36 to 40 would be a good delivery under a contract calling for 40-count average.

Cross-examination.

The market price for such peanuts on the Pacific Coast March 2, 1920, was approximately 10 cents. March 15, 1920, about 9.5 or 9.75, March 30, 1920, about stationary; about April 22, 1920, almost a cent lower. Between April 22 and May 22, 1920, about another one cent drop.

Plaintiff rests. [63]

Mr. PARTRIDGE.—Q. Do you know, Mr. Rude, what the market for peanuts was in Pacific Coast ports on the 2d of March? A. What count?

Q. Either 38–40 or 36–38?

A. Either 38–40 or 36–38 on the 2d of March?

(Testimony of Arthur Rude.)

Q. Yes.

Mr. BROWNSTONE.—Q. You mean 1920, do you?

Mr. PARTRIDGE.—Yes.

A. I would say approximately 10 cents.

Q. What was it about the 15th of March?

A. About 9.75 or 9.50.

Q. And the 30th of March?

A. Probably stationary.

Q. About the same? A. About the same.

Q. And how was it about the 22d of April?

A. About the 22d of April, almost a cent lower.

Q. And then was there another fall of a cent between the 22d of April and the 22d of May?

A. Yes, sir. There was almost a cent. On some sizes there was a cent and a half decline, until about the first week in May it was stationary for a while, and then they took another drop.

Mr. PARTRIDGE.—That is all.

Mr. BROWNSTONE.—That is all. That is our case.

Mr. PARTRIDGE.—Now, if your Honor please, we will move for a nonsuit as to the whole case upon the ground that it appears from the evidence that the plaintiff did not comply with the contract, in that the goods tendered were goods of a different count, peanuts of a different count, from those which the contract called for. And upon the second ground that the representations that were made by the plaintiff to the defendant at all times, even after they had received the Chamber of

Commerce certificates, were to the effect that these peanuts were 40 count, and they were not a 40 count. [64] And upon the third ground that the parties contracted in explicit terms that the Chamber of Commerce certificates should be conclusive and binding upon the parties as to the count, and the Chamber of Commerce certificates showed that the peanuts were not a 40 count, but a 36–38 count. I want to call your Honor's attention to the fact that, so far as the courts of California are concerned, the Supreme Court and the Court of Appeals of this state have universally held that there were specific terms in a contract, limiting and defining the quality of the goods which are the subject of the contract, any custom inconsistent with the terms of that contract is not a proper subject matter of investigation, nor will it support an action based upon that contract. And I cite your Honor the case of Lenhardt against the California Wine Association, 5 Cal. App. 19. Secondly, the Supreme Court of this State, following the case of the Standard Oil Company against Van Eppen in the Supreme Court of the United States, in the case of the California Sugar Company against Pennoyer, 167 Cal. 274, laid down in the rule that nothing is better settled than the rule that where the parties agree that the performance or the nonperformance of the terms of a contract, or the quality, price, or quantity of goods sold, is to be left to the determination of a third person, his judgment or estimate is binding in the absence of fraud or mistake, and a

mistake which will justify an impeachment of the arbitrator's decision is not mere error of judgment but is the kind of mistake which in effect would amount to fraud. The testimony of the plaintiff itself, if your Honor please, shows that on February 19th, when they received advices from Kobe that these 80 tons, which make up the 1,600 bags, which were not according to count, had been shipped, they notified Kockos Brothers that the goods as shipped were 40 count, to apply [65] on the contract. Then upon their arrival, again they notified them that 100 tons of peanuts to cover that contract had arrived. On the 15th of March, when they had, according to the evidence, the Chamber of Commerce certificates in their hands, they again referred to their wire of March 2d, and informed Kockos Brothers that the goods were there, and that they were awaiting shipping instructions. Then even again, on March 27th, when the goods were on their way to Chicago, they write another letter, which is Exhibit "18," and they state there: "Referring to your purchase of 100 tons 40 count Chinese shelled peanuts, and the instructions to ship them to the National Importing and Trading Company." They again state that they have shipped those particular goods, and they accompany that by an invoice which states that the 1,600 bags and the 400 bags are 38–40 count; and it was then, upon the arrival of the documents, including the Chamber of Commerce certificates, that for the first time Kockos Brothers knew the peanuts did not

comply with the contract. We therefore submit we are entitled to a nonsuit upon the grounds that the goods tendered did not comply with the contract.

The COURT.—I think the matter is a question for the jury, gentlemen. The motion will be overruled.

Mr. PARTRIDGE.—If your Honor please, we now move for a nonsuit as to the 400 bags of peanuts which did comply with the contract, upon the ground that Kockos Brothers offered to accept those 400 bags, and the plaintiff refused to deliver them.

The COURT.—What have you to say to that, Mr. Brownstone?

Mr. BROWNSTONE.—Simply this, if your Honor please, that the contract is not a severable contract; that we are entitled to performance in its entirety, or not at all; that is, if, for instance, we purchased 100 tons of peanuts, we are not at liberty to say we will [66] take 20 tons or 30 tons or 40 tons, but we are required to take it all, or none. On the other hand, it is just the same so far as the purchaser is concerned: If you make a contract to purchase, for instance, 100 tons of peanuts, you are not justified in saying "I will deliver 20 tons," or "I will deliver 30 tons." You have got to deliver the whole amount. In other words, it is not a severable or separate contract as that is generally understood. A separate contract may be one, for instance, where there are a number of different commmodities. They might

be peanuts; they might be beans; they might be potatoes. And where you agree to buy, for instance, in one contract a number of different items, then the contract may be considered to be separable as to those particular items but where a contract is specific as to a certain amount, and as to a certain price, that is the entire contract, and must be so held. I have presented to your Honor some instructions along these lines, with authorities from California which I have looked up, also from the Corpus Juris, showing that a contract such as this is not a separable contract, but is an entire contract.

Mr. PARTRIDGE.—It appears from the evidence, if your Honor please, that there were two shipments of these peanuts, that is to say, the 80 tons arrived on a different vessel from the other 20 tons; so that there were two clear and distinct lots. It appears from the evidence that the 20 tons, that is, the 400 bags, were part of a lot of 560 bags that were consigned in Seattle to somebody else; so that there is a clear line of demarcation as between these 400 bags which were tendered, which did comply with the contract, that is, that were 40-count peanuts, and the 1,600 bags which arrived on a different ship, and which did not comply with the contract. And it would seem to me that where there is a definite contract for a definite quality of goods, and where they arrive in port in two lots, and one of those lots does comply with [67] the terms of the contract, and one of them admittedly does not comply with

the terms of the contract, that the contract is severable to the extent that the vendee offering to take those goods which did comply with the contract, and rejecting the others, certainly could not be held to damages because the vendor, forsooth, chose to take the whole shipment and send them on to Chicago and hold them there. It seems to me that that, along the lines of all reason, would seem to excuse the vendee in any event from any damages arising from the decline in the market in those goods which he agreed to take, and there could be no injustice in that. The fact that the vendor might have delivered to us 20 tons, or one-fifth of the entire shipment, certainly couldn't in any way lower or depreciate his rights as to the other 80 tons. It would seem like it would be an injustice from any possible view of the case to say that Kockos Brothers, while they were perfectly willing to take these goods which admittedly complied with their contract,—to say that the vendor could hold those and wait until the market had broken, and then sell the whole lot, although Kockos Brothers were ready to take those goods which complied with the contract.

Mr. BROWNSTONE.—Would your Honor permit me just a word in reply? And it seems to me this is a complete answer to counsel's entire contention in this case, and that his contention shows that, as a matter of law, there had been a breach of the contract. That is this: Your Honor will recall that on March 10th, and that was before any shipping instructions were given,

Kockos Brothers employed Graham, from Seattle, to make an examination of these peanuts; that Graham reported to them the examination of these peanuts on March 12th, which was two days later, and five days prior to the time that Kockos Brothers gave instructions to ship. That telegram of Graham's of March 12th reported to Kockos Brothers [68] that 1,600 bags were 37 count, and, in the parlance of the trade, that would be 36–38; and that 560 bags, of which he was to get 400, were 38–40 count. With full knowledge of the condition of those peanuts knowing that the 1,600 bags were 37 count, and that 400 bags were 38–40 count, he accepted delivery of them by notifying Kockos Brothers, and they notified him to ship them on to Chicago. As a matter of law, and your Honor knows it is a principle that is thoroughly well established, where a man accepts personal property which he may claim doesn't come up to the standard, where a defect which he claims exists in the merchandise is patent, which he himself can see, when he takes that merchandise without making any objection of any kind, and the testimony shows that no objection of any kind was made, he is forever estopped and precluded from ever making any claim that the merchandise was not what he contracted for. Leaving out of consideration, if your Honor please, the other points which were made, and also the testimony that a contract for an average of 40 count is satisfied by a delivery of peanuts which average 36–38 count, as a matter of law in

this case there has been a breach of contract, because, by the acceptance of those peanuts, with full knowledge of their condition, Kockos Brothers are estopped and they have waived any claim they might have against the plaintiff in this case for any alleged difference in the quality.

The COURT.—This consideration would seem to be entirely aside from the point involved in the present motion, however. Assuming that there was a breach of contract as to the 1,600 bags, the question is whether or not the plaintiff can now claim damages on account of the 400 bags which the defendant offered to receive. I don't believe that that is a matter for a motion for nonsuit, gentlemen. I shall deny the motion; however, without prejudice to a reconsideration of the question when it comes to submitting the [69] case to the jury. I will say to you, Mr. Brownstone, my impression is rather against you on that, but I will hear you a little further. I have difficulty in seeing why you should be unwilling to deliver the 400 bags if the offer to take them was unconditional. Of course, if it was conditional upon a settlement of the entire transaction, then there would be no tender of acceptance at all; but I won't entertain further discussion at the present time. The motion will be denied, but as I say, without prejudice to a reconsideration of the question when it comes to instructing the jury what the measure of damages will be.

Mr. PARTRIDGE.—Will your Honor permit us an exception to both rulings?

The COURT.—Yes.

EXCEPTION No. 3.

Testimony of J. S. Courreges, for Defendants.

J. S. COURREGES, a witness sworn on behalf of defendants, testified as follows:

I live in San Francisco and have been in the exporting and importing business for twenty-two years. I have been connected with The Hale Company for the past eight years. I have handled large quantities of Chinese shelled peanuts for 15 or 16 years. I am familiar with the fact that they are dealt with by count. According to the general custom of the trade a delivery of 36–38 count peanuts would not be a good delivery under a contract calling for a 40-count average but a delivery of 38–40 count would be a good delivery.

Cross-examination.

I do not recall that there was a sharp break in the peanut market in the early part of 1920. A 36–38 peanut is as good as a 38–40 peanut and can in many respects be used for the same purposes. I believe I have sometimes received 36–38 count on a 38–40 count contract and have, I believe, sometimes delivered 36–38 count on a [70] 38–40 contract. I didn't consider I was complying with the contract when I delivered the 36–38's, but as long as the market was favorable to the buyer he did not object. They generally object on a falling market but there are other objections

(Testimony of J. S. Courreges.)

also. When a market is favorable to the buyer, nobody makes any objection. In the general run of peanut business, they never raise any objection to a peanut that is 36/38, where the contract calls for 38/40, and then only when the market is falling. We never have any rejections for that reason on a rising market.

Testimony of A. Schuman, for Defendants.

A. SCHUMAN, a witness sworn on behalf of defendants, testified as follows:

I live in San Francisco; I am an importer and have been for thirteen years. I am familiar with Chinese shelled peanuts and the price of them in March, April and May, 1920. The price of Chinese shelled peanuts, duty paid on the Pacific Coast March 1st, 1920, was 11½ cents for 38's, March 12th it was $11, and March 26th $10.85. April 8th it was 10¼; all prices duty paid. From April 22d to April 28th $9.00 duty paid. During May the price remained stationary. According to the general custom of the trade a delivery of peanuts of 37.6 count would not be a good delivery under a contract calling for a 40 count.

Cross-examination.

The price of $11.50 in March would not be for a less quantity than a carload because we never handled any less quantities, we sell wholesale. The price in Chicago would be the same, plus the freight and probably a little more. There was a falling market because there were a lot of pea-

(Testimony of A. Schuman.)

nuts afloat. We handled 8,000 tons of peanuts that season and I do not think I would have had any difficulty in selling 100 tons in April at very close to the price I quoted. There might have been sales at 8½ cents, but I do not know of any.

In order to be a good delivery under a 40-count contract the peanuts would have to average 38–40. A 36–38 peanut is as good as [71] a 38–40, but I do not know whether it can be used for the same purposes or not. I do not recall ever having accepted or delivered 36–38 peanuts on a 38–40 contract. I do not recall of any instance of anybody objecting to a delivery of 36–38 peanuts on a 38–40 contract, except the market was falling. There is no visible difference in the size of the peanut. I might be able to distinguish between a 36/38 and 38/40 if I had them side by side. I could see that the 36/38 was perhaps a little larger. (The witness was then shown by Mr. Brownstone the two boxes of peanuts heretofore offered in evidence, the 36/38 count being marked No. 1, and the 38/40 count being marked No. 2, and was asked to examine the two samples, and then to tell which box was 36/38 count and which was 38/40.)

Mr. BROWNSTONE.—Q. Supposing you look at these two boxes of peanuts and tell us whether you can tell one is 38/40 and the other is 36/38, or are they the same? What would be your judgment on it?

(Testimony of A. Schuman.)

A. Offhand I would say that these here (indicating 36/38 box) were the 38/40.

Mr. BROWNSTONE.—Well, your guess was wrong. I just want to call the jury's attention to the fact that this is the 36/38.

Peanuts have regular grades according to the custom of the trade. A delivery of 40–42 count would not be a good delivery under a contract calling for 40 count average because of the trade custom. "Chinese peanuts 40 count average" does not mean either 40 or less, nor 40 or more.

Redirect Examination.

It does not mean 40 or less because that would permit of any size under 40 and there are particular sliding scales of sizes and a man buys a particular size for his own purposes and when he contracts for 40 count that is what he wants.

Recross-examination.

I don't recall stating that I never heard of a man rejecting a lot of peanuts where he contracted for a 38–40 and was delivered 36–38, except on a falling market. A 40 count means 38–40 and a delivery of 30–32 or 28–30 would not be a good delivery. The trade have exact counts of 30–32, 32–34, 34–36, 36–37 on up to 38–40 and each grade will give that average in between say 38–40 or 30–32. Under trade custom a delivery of peanuts that counted 38 would be good under a contract calling for 40-count average.

Testimony of Andrew Kockos, for Defendants.

ANDREW KOCKOS, a witness called on behalf of defendants, testified as follows:

I live in San Francisco. I am one of the defendants in this case, my brother Harry is the other. I am in the wholesale [72] groceries business in San Francisco and have been for 15 years. We had made a contract of sale for the peanuts purchased under this contract from Itoh & Company, to a National Importing & Trading Company. Here counsel argued as to the admissibility of the contract between defendants and the National Importing and Trading Company. Counsel for plaintiff conceded that there was such a contract.

Mr. PARTRIDGE.—If your Honor please, are we not entitled to that testimony and the testimony following it, in regard to rejection upon this ground: An attempt has been made here to show that a delivery of 36–38's is a good delivery under a contract calling for 40's. Are we not entitled, in answer to that, to show that, as a matter of fact, the very person to whom we agreed to deliver these peanuts did not treat it as a good delivery and rejected on us?

The COURT.—No, not for that purpose. For that purpose the offer will be rejected, and you may have your exception.

Mr. PARTRIDGE.—May we have an exception to that?

The COURT.—Yes.

EXCEPTION No. 4.

Mr. PARTRIDGE.—Now, on the other point, I am not sure whether Mr. Brownstone admits that this Company was not the agent of Kockos Brothers or not.

Mr. BROWNSTONE.—I don't think it is necessary for me to make an admission of law. I am making an admission of fact, that there was a contract for the sale of this 100 tons of peanuts made by Kockos Brothers with the National Importing & Trading Company. Those are the facts before the Court, and the question of agency is one for the Court to determine.

The COURT.—And that telegram upon which you rely was [73] sent to it as such purchaser?

Mr. BROWNSTONE.—There wasn't any telegram sent to it, may it please the Court. The telegram was sent to my clients, telling them that they should deliver to the order of the National Importing & Trading Company. That is all we are claiming.

The COURT.—Counsel has admitted, any way, that a contract existed, and that is all that you can prove by this instrument, that a contract existed between the defendant here and the National Importing & Trading Company, by which the latter was to take over these peanuts, in other words, a contract of sale for these peanuts. If you wish to explain that telegram in any other way, of course you may make your offer.

Mr. PARTRIDGE.—I will offer in evidence this contract between Kockos Brothers and the National Importing & Trading Company, and will call your Honor's attention to the fact that it provides that it is the National Importing & Trading Company of—

Mr. BROWNSTONE.—I suggest it isn't necessary for counsel to read that contract.

Mr. PARTRIDGE.—I am not going to read it. I call your Honor's attention to the fact that the National Importing & Trading Company is here designated as being of Chicago, and not of Seattle. Now, it is very likely that they knew nothing about this matter until the documents came, the same as we didn't.

The COURT.—This instrument wouldn't be proof of that fact, anyway. In view of the admission of counsel for the plaintiff, the offer will be rejected, and you have your exception.

Mr. PARTRIDGE.—And your Honor will let us have an exception?

The COURT.—An exception, yes. We will take a recess until 2 o'clock.

EXCEPTION No. 5. [74]

The following contract offered by defendants and rejected is as follows:

MERCHANDISE CONTRACT.
KOCKOS BROS.

Importers, Exporters and Wholesale Grocers.
Cigars and Tobaccos.
46–56 California Street.

No. 169.

San Francisco, Cal., November 10th, 1919.

KOCKOS BROS., San Francisco, California, hereby agrees to sell and NATIONAL IMPORTING & TRADING CO., Inc., Chicago, Ill. hereby agrees to buy

Article: CHINESE SHELLED PEANUTS 38/40s, F. A. Q. of the Season, 1919 crop.

Quantity (About): 100 TONS, (2,000# each).

Shipment: December/January from the Orient.

By Steamer or Steamers, Direct or indirect to:

Price: $12.00 per 100#, duty paid, F. O. B. Pacific Coast, gross for net weights, landed reweights.

Payment: Sight draft against railroad bills of lading, payable on presentation.

Remarks: Goods to be in good merchantable condition on arrival at Pacific Coast.

KOCKOS BROS.
ANDREW KOCKOS,
Sellers.

Accepted:

NATIONAL IMPORTING & TRADING CO., INC.

R. FIRMAN,

Buyers:

J. A. WICKMAN & CO.,

By ARTHUR BETTS,

Broker. [75]

Here a recess was taken to 2 o'clock P. M., June 7th, 1922, and Andrew Kockos testified further as follows:

Mr. PARTRIDGE.—If your Honor please, I am going to hand to the witness a telegram and letter, somewhat along the lines I suggested this morning, and after I have shown it to counsel, I will state the theory that I have in mind. If your Honor please, my idea in offering them is this—

The COURT.—Perhaps there is no objection. Do you offer this telegram?

Mr. PARTRIDGE.—Yes, the telegram and the letter.

Mr. BROWNSTONE.—We object to both of them, your Honor, on the ground they are entirely incompetent, irrelevant and immaterial. They are in the nature of hearsay statements, and statements made by the National Importing & Trading Company, not under oath, to persons other than the plaintiff in this case, in a transaction with which the plaintiff was not in any way connected. It is purely a hearsay statement.

Mr. PARTRIDGE.—My idea in regard to that, if your Honor please, is this: Evidence has been presented by the plaintiff which they claim shows that, under the custom of the trade, where a contract calls for peanuts of a certain size larger peanuts will be accepted. I submit it is competent for us to show as to these very peanuts that they were not accepted by our purchaser, and the reasons why the purchaser would not accept them. I suppose that that general custom can be shown as well by specific instances as it can by anybody's opinion, and I think for that reason those communications are competent.

The COURT.—Assuming it could be shown by specific instances, you would have to produce the witnesses so that they would be subject to cross-examination. This would be merely hearsay. [76]

Mr. PARTRIDGE.—Well, is it hearsay, if your Honor please, when the document itself constitutes the act? That is to say, those papers are the rejection of the goods. They constitute the act by which that specific purchaser refused to accept the goods, for the reason given. I submit to your Honor isn't that an act in itself, rather than a mere statement?

The COURT.—The objection will be sustained.

Mr. PARTRIDGE.—Will your Honor permit us an exception?

The COURT.—Yes, you may have an exception to each.

EXCEPTION No. 6.

The telegram and letter offered by defendants and rejected are as follows:

"1920, Apr 7 AM 11 55

B155CH 44 Blue

D Chicago, Ills. 11 A 7

Kockos Bros.

San Francisco, Calif.

We have just received Chamber Commerce report on your shipment of peanuts. They do not correspond with the contract either in count or date of shipment We cannot use and absolutely refuse to accept same as filling our contract one six nine Notify your shipper.

NATIONAL IMPORTING AND TRADING CO."

"Apr. 7, 1920.

Kockos Bros.,

San Francisco, Cal.

Gentlemen:

We wired you today as follows:

> "We have just received Chamber of Commerce report on your shipment of peanuts. They do not correspond with contract either in count or date of shipment We cannot use and absolutely refuse to accept as filling our contract one six nine Notify your shipper.

[77]

Our Seattle office could not give you instructions to ship peanuts that were not according to count regardless of whether they were larger or smaller. As a matter of fact the smaller count

(Testimony of Andrew Kockos.)

has a more ready sale in this market than the larger one, and while you may have tho't you were doing us a favor to ship 1600 bags of Peanuts that were larger than your contract called for, the facts are that these peanuts are not so valuable as the smaller count. If we had known what you were shipping us we would have wired you long before, as we cannot fill our contracts with this shipment.

Also these Peanuts were not shipped within the time limit of our contract, and for these various reasons we absolutely refuse to accept delivery of same on our contract with you.

Awaiting your further favors, we are

Very truly yours,

NATIONAL IMPORTING & TRADING CO., INC.

J. M. HOLFERTY,

JMH:AO. Manager."

(The witness continued as follows:) I have bought and sold several thousand bags of peanuts during the year 1920 and am familiar with the price of shelled peanuts in March, April and May, 1920. On March the 1st the price was $11.50 to $11.75 on 38–40 count peanuts f. o. b. Pacific Coast. We made sales at 11.50. I do not know the price of the 36–38 count peanuts at that date. From March 10th to 30th the price on 38–40's was 11 cents per pound to 11¼. We made sales at $11.00 per hundred f. o. b. Pacific Coast. During April, from 1st to 22d we made sales for

(Testimony of Andrew Kockos.)

$10.45 per hundred pounds. On April 22d we made a sale at $9.50 and on May 20th one for $9.50 f. o. b. the Coast. I did not reject the peanuts immediately on receipt of telegram from Callaghan, Graham & Company of Seattle on March 11th because I did not consider the information binding under the contract. I did not know anything about what the Chamber of Commerce certificates showed as to count until I received the documents on March 29th or 30th.

Mr. PARTRIDGE.—When you sent the plaintiff, Itoh & Company, instructions to ship these peanuts to the National Importing & Trading Company, upon what were you relying?

Mr. BROWNSTONE.—That is objected to, if your Honor please, [78] as calling for his opinion and conclusion, and as incompetent, irrelevant and immaterial. It can't make any difference upon what he was relying. The only thing we can be governed by is the facts as they existed, and what he thought or felt in connection with this matter can't control the legal rights of the parties.

The COURT.—Objection sustained.

Mr. PARTRIDGE.—Will your Honor permit me an exception?

The COURT.—Yes.

EXCEPTION No. 7.

(The witness continued as follows:) In the peanut trade peanuts are graded by size from 20–30 up to 38–40's and for candy manufacture

(Testimony of M. J. Collum.)

a buyer must get the size specified for his particular use because he has screens through which the larger peanuts will not pass. For peanut butter the 36–38's will do just as well.

When you are not in actual possession of the goods on selling imported merchandise you must deliver the bill of lading and other documents to the buyer. When I received the invoice of March 17th from Itoh & Company which stated that there were 1600 bags 38/40 count and 400 bags 38/40 count I did not know anything about the size of the nuts or that 1600 bags were 37 count. In a contract such as this calling for 40 count average the general custom of the trade is to deliver peanuts coming very close to that count, say 39.7.

Here Mr. Kockos stepped down for a moment and M. J. COLLUM, witness for plaintiff previously summoned, was recalled and testified as follows:

Testimony of M. J. Collum, for Defendant (Recalled —Cross-examination).

Cross-examination.

I testified in the case of Christou vs. Bashaw as to the price of peanuts in the Spring of 1920. I was referring to a [79] specific size 32/34 count and they are an odd size. Not many of that size come into the market. They are used for blanching and bring a higher price than 36/38's and 38/40's which are used for confections. There may be two cents difference in the price.

Testimony of Andrew Kockos, for Defendants (Resumed.)

ANDREW KOCKOS, a witness for plaintiff, previously sworn, continued as follows:

There is never more than 50 cents difference in the price of 32/34's and 36/38's per hundred pounds. There are as many 32/34's as there are other sizes.

Cross-examination.

I sent a telegram, March 10, 1920, to Callaghan, Graham & Company, Seattle, Wash., to inspect 100 tons of peanuts 38/40 count for us because I had received an unsatisfactory report. I mean I had heard they were moldy. I don't remember whether the other report was written or not, I do not have it now. I received the following telegram from Callaghan, Graham & Company March 10, 1920.

"Examined today two lots China shelled peanuts totalling hundred eight tons per your wire fifth Itoh shipping 1600 bags ex Eastern Victor marked Diamond I. T. C. actual count 37, sound, clean, evenly graded, free from mould, dirt or worms, excellent condition, exceptionally good delivery on 40 count contract. Lot 560 sacks ex Eastern Ocean marked three stars, actual count 39, clean, free from worms, webs or dirt, average two nuts slightly mouldy out of 625. May not increase but don't like even slight trace. Advise if want samples. Callaghan, Graham & Company." [80]

(Testimony of Andrew Kockos.)

Q. You read that when you received it, did you not?

A. I read the wire in some respects, yes.

Q. Well, didn't you read the wire?

A. Yes.

Q. What do you mean by saying you read it in some respects?

A. In segregating and resting my mind as to the mould which I previously received the answer about, that several shipments in Seattle arrived in bad condition.

Q. Then you knew when you received this telegram that 1,600 bags of that shipment were 37 count, did you not?

A. I didn't pay any attention to the count because our correspondence was for 40, and not assuming in that respect that I would get what I did I paid no attention to the count at all.

Q. Will you look at this telegram again and tell us when you read it what you read? What did you see in this telegram if you didn't see that it said 37 count, 1,600 bags?

A. Well, this wire here represents 108 tons, for instance. Now 108 tons were more than our contract, and it was not separated to me clearly as to the particular count, and I don't know whether this man here had given me the right count. He wasn't a Chamber of Commerce man, but was an ordinary man to look at the shipment, so, therefore, I based my statement on the quality and not on the count of this particular wire.

(Testimony of Andrew Kockos.)

Q. You knew a peanut when it was packed was 100 pounds to the bag, didn't you?

A. Sometimes they come 140 pounds, and 130 and 200 pounds.

Q. You could tell from that telegram, couldn't you, that those peanuts were packed 160 to the bag?

A. It isn't quite clear, in my opinion, here, and, as I say to you, I didn't pay any attention to the count of these peanuts, and he was not the man that I got to count these peanuts, because to count the peanuts is a very delicate thing, a very delicate thing to take a certain number of [81] samples and weigh them, and such things as that, such as the Chamber of Commerce issues certificates on.

Q. Look at that telegram and tell me if it doesn't say 1,600 bags and 540 bags, totalling 108 tons? Isn't that what it says?

A. According to the wire here that is what it says.

Q. Now, it doesn't show 100 pounds to the bag?

A. Well, if you stop to figure it, it does, according to that.

Q. And you were buying 100 tons, were you not?

A. Yes.

Q. And you knew then that you had to take part of that 1,600 sacks in order to make up your hundred tons, didn't you?

A. As I say to you—

Q. Answer me. Didn't you?

(Testimony of Andrew Kockos.)

A. I did, with conditions, that I did not pay any attention whatsoever to the count, for this reason, that the contract which I had with Itoh & Company specified strictly 40's average count, with Chamber of Commerce certificates, and before I paid any attention as to particular count I had to have the certificate to represent and see that it was correct, because the Chamber of Commerce goes to work and opens 10% of the lot, which makes about 200 bags, and takes samples from various bags; and this man here did not open any of the bags. He just went down there and probably opened a bag or two and took just a few samples. And furthermore—

Mr. BROWNSTONE.—Well, I rather think the witness has answered the question.

Mr. PARTRIDGE.—I think he is entitled to a full explanation, if your Honor please.

The COURT.—Proceed.

A. And, furthermore, this particular wire was not quite straight for any man to go ahead and inspect 108 tons of peanuts with the same marks, and I didn't know what bags he opened particularly to [82] draw samples out to present me a 37 count. I wasn't sure that was a fact and I paid no attention to it, assuming that our contracts and the correspondence from Itoh & Company were in order, and I took it for granted I didn't have to go to the trouble or extra expense to have my man go to the Chamber of Commerce and issue another new certificate as long as I would get a certificate from Itoh & Company.

(Testimony of Andrew Kockos.)

Mr. BROWNSTONE.—Q. Mr. Kockos, you have testified, haven't you, that you had a contract that was 40 count average? Didn't you? A. Yes.

Q. And you claim, as I understand you, that, in order to comply with the terms of that contract, you had to get a peanut that would average about 39.6 to the ounce, didn't you?

A. Well, it would come around to that variation, yes.

Q. And you knew that at the time you received that telegram, didn't you?

A. I did not pay any attention to—

Q. I didn't ask you that. Didn't you know you had a contract with Itoh & Company at the time you received that telegram, which specified an average of 40 count? You can answer that yes or no, and make any explanation you want.

A. I said to you that I received this wire, and in reading the wire—I say yes, with the explanation as I previously explained.

Q. Your answer is that you did know at the time you received that telegram that you had a contract with Itoh & Company which provided for a delivery of an average 40 count peanut, didn't you?

A. Yes, I presume at the time I knew about it. Of course, we received, twenty, thirty or forty wires, and I couldn't have my mind on what occurred several months ago. And I presumed he wouldn't tell me anything else, and I acted in good

(Testimony of Andrew Kockos.)

faith according to the [83] instructions I received from Itoh & Company.

Q. Now, Mr. Kockos, knowing at the time you received that telegram that you had a contract with Itoh & Company which provided for a delivery of a 40 count average peanut, do you want to tell the Court and jury now that when you read that telegram you didn't see that 1,600 bags of peanuts described in that telegram as 37 count? Is that what you want to say?

Mr. PARTRIDGE.—If your Honor please, I will object to the form of that question as manifestly improper, as to what he wants to tell the Court and jury and the form of the question, I submit, is objectionable.

The COURT.—I think perhaps you have pursued the cross-examination on that far enough so as to enable you to argue the matter to the jury.

I read the telegram, but since I was only concerned with mould I did not pay any attention to the count because our contract called for count to be made by the Chamber of Commerce and this firm was not working for the Chamber of Commerce. I knew at the time I received this telegram that we had a contract with Itoh & Company calling for 100 tons peanuts 40 count average, but I did not pay [84] any attention to the count.

I wrote the following letter to Callaghan and Graham March 12, 1920, after receiving their telegram:

"We have received your wire of March 10th, giving us full information in regard to inspection of 100 tons peanuts to Itoh & Company, which information was very clear to us, and we thank you for your prompt inspection and answer. We will communicate with you from time to time to give you some of this business, and in the meantime if you are interested in buyng anything kindly let us hear from you.

We remain yours very truly,

KOCKOS BROTHERS,
By ANDREW KOCKOS."

After receiving the wire of March 10th from Callaghan, Graham & Company, I sent the following telegram to Itoh & Co. March 17th.

"San Francisco, March 17, 1920.

"Itoh & Company,
Central Building, Seattle.

Ship hundred tons peanuts Kockos Bros. Chicago. Notify National Importing & Trading Company. Phone them. They probably will change shipping instructions. This satisfactory to us. Advise.

KOCKOS BROTHERS."

I sent that telegram because Itoh & Company insisted on shipping instructions and I wanted the bill of lading. A 38/40 peanut would comply with a contract calling for 40 count average, but a 36/38 peanut would not.

The COURT.—No, no, that isn't the question.

Mr. BROWNSTONE.—Your Honor, I don't like to pursue the inquiry, but I haven't yet been able

(Testimony of Andrew Kockos.)

to find out from the witness in what respects it does comply or in what respects it does not. Perhaps your Honor can help me in the matter.

The COURT.—Q. Here is a contract calling for a 40 average. A. Yes.

The COURT.—Q. Bearing that in mind, according to the practice or custom of the trade would a tendered delivery of peanuts of 38–40 meet the requirements of this contract calling for a 40 average?

A. Yes, that would pass all right. That would go for a shipment of 38–40's.

Mr. BROWNSTONE.—Q. If it was 36–38 would it comply? [85] A. It wouldn't comply; no.

Q. Why would the 38–40 comply and not the 36–38?

A. Because the manufacturer uses the particular size, 38–40s, for particular or certain purposes, and that is why they specify the particular sizes that they want; otherwise, it would say "We buy a hundred tons of peanuts," and not specifiy anything. The only way is to describe or specify the particular counts, and there is a certain price and certain limit to this commodity, of peanuts, that cannot otherwise be identified unless they have the particular sizes in the contract.

Q. Isn't it a fact that a 36–38 peanut and a 38–40 peanut are simply averaging the size of the peanuts in the ounce? In the ounce of peanuts they average the size, don't they? A. Yes, sir.

Q. Isn't it a fact you will find a number of pea-

(Testimony of Andrew Kockos.)

nuts in a 36–38 count that are identically the size of those in 38–40 count?

A. No, I couldn't say that, because you have to take less peanuts to make the weight.

Q. You don't mean to tell us that every peanut in a 36–38 is a different size than every peanut in a 38–40, do you?

A. They are not different by looks, but the weight isn't there.

Q. The total weight isn't there, but you don't mean each individual peanut in a 36–38 is a different size from the peanuts in a 38–40, do you?

A. Well, of course, that would be a pretty close question to say one way or the other, for the reason, as I said to you, they take so many samples from so many bags to get that particular count, and, naturally, when you take and put on your table ten or fifteen samples of 36–38's and 38–40's, you can easily tell the difference.

Mr. BROWNSTONE.—That is all. [86]

Mr. PARTRIDGE.—That is all. Mr. Courreges.

Testimony of J. S. Courreges, for Defendants (Recalled).

J. S. COURREGES, a witness for defendants, heretofore sworn, being recalled, testified as follows:

I looked up my records as to market price of peanuts in April and May, 1920. I find that on April 24, we sold 38/40's at $9.50 per hundred, duty paid f. o. b. cars San Francisco; April 30th, $9.25; May 5th, $9.50; May 15th, $9.50.

(Testimony of Harry Kockos.)

Cross-examination.

The sale on May 15th was a 50-ton lot. The others were from one to two cars. My records do not show any steady decline in the price. The Chicago market is based on the Pacific Coast market. [87]

Testimony of Harry Kockos, for Defendants.

HARRY KOCKOS, a witness for defendant, being first duly sworn, testified as follows:

I am one of the firm of Kockos Brothers, defendants here. I have shipped hundreds of cars to Chicago. It takes from 10 to 20 days for a car to go from Seattle to Chicago, the average being about 15 days.

(Here plaintiff and defendants rest.)

After argument to the jury by attorneys for plaintiff and defendants, the Court instructed the jury as follows:

Charge to the Jury.

The COURT.—Gentlemen of the jury, my instructions to you will be comparatively brief. As you have been advised, the plaintiff comes into court here suing for what is ordinarily referred to as a breach of contract for the sale of merchandise. The contract has been read to you, and, so far as most of its terms are concerned, they are not in dispute, there being but one clause, or phrase, of the contract in controversy. The contract, as you have heard, is for the sale of approximtaely 100 tons of Chinese shelled peanuts, of a certain crop

and quality, and the size is described as being 40-count average; and that is one phrase, or clause, to which your attention has been directed, and to which your attention will probably be directed by these instructions. The defendant admits the execution of this contract; and it also admits that it declined to accept the peanuts which the plaintiff tendered to it; the defense being that the nuts were not the 40-count average size, that being the only defense. In such case the burden is upon the plaintiff to show, by a preponderance of the evidence, that it tendered substantially what the contract [88] calls for, or, if it did not tender precisely what the contract calls for, that the defendant waived its right to reject the offer, and in fact accepted the tendered article in fulfillment of the contract.

Generally speaking, I have to say to you that a party to a contract cannot, and the plaintiff here could not, tender something other than the precise thing called for by the contract, claimed to be as good, or better, and demand the acceptance thereof. It must tender what it contracted to deliver unless, as already suggested, the defendant, with full knowledge of the facts, waives the objection and accepts the substituted article as a fulfillment of the obligation of the other party to the contract. As you have heard here, the contract calls for a 40-count average. Some testimony was admitted as to the custom of the import trade in peanuts, the wholesale trade, of the meaning of this phrase as the same is understood by men engaged in the

trade. This testimony, gentlemen, was not offered or received for the purpose of changing the contract, or justifying you or me in changing or altering the contract, or relieving either party from the obligation thereof, but merely to assist us in determining what the contract is, and whether the peanuts tendered by the plaintiff were within the terms thereof as the same was understood and entered into by the parties. In other words, this testimony was received for the purpose of throwing light upon the meaning of this phrase, not of changing it or modifying it in any way, but of finding out what its meaning was, for the purpose of finding out what the parties really agreed upon and what their contract and obligations were.

It is conceded by the defendant that, as such a contract, or such a phrase, is understood in the trade, it is not necessary that the nuts average precisely 40 to the ounce, but [89] that 38–40, as they are called, would be regarded as meeting the requirement, or the demand, of such phrase. And the defendants further contend that any larger nut than 38's would be beyond the meaning of this phrase, or be without its meaning, and, hence, would not meet the requirements. The plaintiff, on the other hand, contends to the contrary, and has introduced witnesses whose testimony tends to show that the count 40 average is understood in the trade to be only a limit to the smallness of the nuts; and that under such a contract it is the common understanding and custom that a slightly larger nut is deliverable; and that

not only 38–40's but that 36–38's are deliverable, and are customarily delivered and accepted under such a contract as being in fulfillment thereof. There is that difference, you will see, one party contending that 38–40's fulfilled the contract, and the other party, the plaintiff, contending that not only 38–40's would fulfill it, as is the common understanding, but that even a slightly larger nut, a 36–38, would be regarded as complying with the terms. It is for you to say upon which side of this particular issue the truth lies. If, from the evidence, you believe that, under trade customs and practice, the parties, when they entered into this contract, intended and understood that it called for a 40-count average, and that it was merely a limit upon the smallness, that it couldn't be smaller than 40, and that it would be satisfied by 38–40's, and also 36–38's, a slightly larger nut, then you will find for the plaintiff, for, in that contingency, it is submitted that the plaintiff tendered such a nut as was called for by the contract, that is, upon the assumption that it means 36–38's as well as 38–40's. If, upon the other hand, you find that the 36–38's did not meet the clause of the contract as it was understood by both parties [90] when it was entered into, and by the custom and practice of the trade, to which I have adverted, then you will consider plaintiff's contention of a waiver and acceptance by the defendant, for one party to the contract, that is, the purchaser under a contract, who has the right to demand goods of a certain class or quality, may

waive some defect or objection upon that ground and accept the goods of a somewhat different type or quality, in fulfillment of the contract. You have heard the testimony upon this point, and the discussion of counsel, tending to illuminate it; and you will say whether or not, with knowledge of the facts, the defendant did in fact waive such objection, if any there might be upon this ground, and did in fact accept the tendered nuts as being in full compliance with the obligations of the plaintiff to deliver under the contract. If you find that such an acceptance was in fact and intelligently made, then the defendant would be bound just the same as if such nuts were originally agreed upon. If, upon the other hand, you find that there was no waiver and acceptance, and you find that the nuts were not in accordance with the clause of the contract as understood by the parties, then your verdict should be for the defendant, absolutely; but if you find for the plaintiff, under the instructions I have given you, the next question is as to the amount of its damages.

Generally speaking, gentlemen, the measure of damages in such case is the difference between the price that the plaintiff was to receive under the contract, and the price which could be, and was reasonably, received upon the market for the merchandise, less the expense reasonably and necessarily incurred in taking the nuts to the market and in marketing them, [91] preserving them of course, where it is necessary to preserve them for a given length of time, and warehouse charges

where a warehouse is necessary, and all expenses reasonable and necessary in caring for and in marketing the nuts. In other words, the theory is that in such a case the party who has been wronged, the party whose contract has not been fulfilled by the other party, should be made whole, and should receive what is reasonably necessary to make him whole, and to give him what he would have received under the contract. Have you a form of verdict, Mr. Clerk?

The CLERK.—Yes, your Honor.

The COURT.—I should say to you gentlemen that it is necessary that all of you concur in finding a verdict. Two forms have been prepared. One you will use in case you find for the defendant. No blank is left in that. Your foreman will simply sign it when you have agreed, if you do agree. And the other form is to use in case you find for the plaintiff, and a blank is left in that form in which you will insert the amount of damages which you may find due to the plaintiff. You will understand that you are to be kept together now, gentlemen, and you will retire in charge of the bailiff.

Mr. BROWNSTONE.—Your Honor, will you allow us an exception to the instructions which you haven't given?

Mr. PARTRIDGE.—And would your Honor permit us an exception to your Honor's instruction with regard to the waiver, and in connection with that an exception to the failure to charge the jury as

to the effect of the Chamber of Commerce certificates.

The COURT.—I will call the jury back, if necessary. Do you think that is material?

Mr. PERRY.—Yes, your Honor.

Mr. PARTRIDGE.—I thought so, that there can be no waiver [92] without the Chamber of Commerce certificate, in other words. We have in the proposed instructions cited a large number of authorities—

The COURT.—There is no question of the correctness of your view, that the certificates of the Chamber of Commerce is controlling upon the question of the count, but there is no difference between you as to the count, I understand. Your witnesses all agree that the count doesn't come up to 40, and you agree that some of the nuts are only 36–38's, and I can't see how the certificate cuts any figure.

Mr. PARTRIDGE.—My thought about it was that there could be no waiver without knowledge, of course, and that the only knowledge that they were entitled to rely upon was the knowledge in the Chamber of Commerce certificates, and, therefore, there couldn't be any waiver unless it was shown that they had the Chamber of Commerce certificates.

Mr. BROWNSTONE.—If they had the same knowledge that was in the Chamber of Commerce certificates—why they could know anything if they knew the facts. At any rate, I thought, as a matter of law, they had waived it, because there was

no dispute about the fact that they knew it was a 37 count, and, knowing it was a 37 count, they accepted the delivery of it.

The COURT.—I don't know just what instruction to give to the jury upon that. Of course, to begin with, I intended to give such an instruction, but when it turned out there was no dispute about the count—

Mr. BROWNSTONE.—I don't see how that can affect it because your Honor has instructed the jury now that if under the contract they were entitled to get a 38–40 nut then they should bring in a verdict for the defendant. You have stated that in so many words. [93]

Mr. PARTRIDGE.—That isn't the point. The point that I had in mind was this, that the claim is made that this telegram conveyed them information and with that information in mind, by giving shipping instructions, they waived the count of the peanuts. It would seem to me that we would be entitled to an instruction that they were entitled to rely upon the Chamber of Commerce certificate and not upon this outside information which they obtained and until they got the Chamber of Commerce certificate they couldn't waive the—

The COURT.—The real point is then that they couldn't waive their right to see what the contract called for until they got the Chamber of Commerce certificate?

Mr. PARTRIDGE.—That is it, exactly.

The COURT.—I think I shall deny the request,

and you may have your exception. I think they could waive anything—that they could waive the certificate, and they could waive the information to be gotten in the certificate, if they so desired. Now, Mr. Brownstone, you, in some general way, excepted to the instructions not given?

EXCEPTION No. 8.

Thereupon the jury retired and returned the following verdict:

"We, the jury, find in favor of the plaintiff, and assess the damages against the defendants in the sum of $8,500."

Whereupon the Court granted to the defendants a stay of execution for 15 days.

The above and foregoing comprises all the proceedings upon the trial of the said cause. [94]

Specifications of Particular Errors of Law.

I.

That the Court erred in refusing to permit the defendants herein to file their demurrers and in refusing to consider their demurrers herein.

II.

That the complaint of plaintiff on file herein does not state facts sufficient to constitute a cause of action against these defendants or either of them.

III.

The Court erred in admitting evidence of the custom of the trade to the effect that peanuts 36/38 count complied with the terms of the contract providing that the peanuts should be 40 count in this, that the contracts specifically provided that the

peanuts should be 40 count, and that the Chamber of Commerce certificate should be final.

IV.

The Court erred in denying defendants' motion for a nonsuit in this, that the plaintiff's evidence showed that the contract was for peanuts 40 count, Chamber of Commerce certificate to be final, and the plaintiff's evidence showed that 1600 out of the 2000 bags were 36/38 count and the Chamber of Commerce certificate shows that the same were 36/38 count.

V.

The Court erred in denying defendant's motion for a nonsuit as to 400 bags of the peanuts involved in the said contract in this, that the plaintiff's evidence shows that 400 bags of said peanuts compiled with the said contract and that the defendant offered to accept and pay for said 400 bags and plaintiff refused and sold the same. [95]

VI.

The Court erred in refusing to allow testimony of defendants as to contract with the National Importing and Trading Company in this, that it was preliminary to evidence showing a specific instance of refusal to accept 36/38 count peanuts on a contract calling for 40-count average as bearing on the general trade custom.

VII.

That the Court erred in refusing testimony of defendants showing that the National Importing and Trading Company was located in Chicago in this, that it was evidence tending to show lack of

knowledge of said company that the peanuts were not 40 count and therefore that there was no waiver of the defect.

VIII.

That the Court erred in refusing evidence of defendants showing rejection of the 1600 bags of peanuts by National Importing and Trading Company because they were not 40 count in this, that said evidence tended to prove the general custom of the trade as to such practice.

IX.

The Court erred in refusing evidence of defendants as to what information defendant was relying on when he gave shipping instructions to plaintiff in this, that said testimony tended to prove that defendant had no knowledge of the variation of the size of the peanuts from the contract count and so did not waive the defect.

X.

The Court erred in refusing to instruct the jury that the Chamber of Commerce certificates as to count were final and the only information upon which defendants could rely as to the count in accordance with request of defendants, in this, that the contract stated that the Chamber of Commerce certificates as to count should be final and [96] defendant having given shipping orders before knowing what the Chamber of Commerce certificates showed as to count could not have had knowledge of the defect and hence could not have waived the defect.

XI.

The Court erred in failing to instruct the jury to find for the defendants in accordance with the request of said defendants.

IT IS HEREBY STIPULATED that the above and foregoing may be settled and allowed as and for the bill of exceptions herein and that the same may be signed by the trial Judge outside of the District without objection; or may be settled and signed by any Judge of this court in San Francisco, California.

BROWNSTONE & GOODMAN,
Attorneys for Plaintiff.
RAYMOND PERRY,
MASTICK & PARTRIDGE,
JOHN S. PARTRIDGE,
Attorneys for Defendants.

The foregoing bill of exceptions is hereby settled and allowed.

Dated: 1st day of September, 1922.

E. S. FARRINGTON,
Judge.

[Endorsed]: Filed Sep. 2, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [97]

(Title of Court and Cause.)

Petition for Allowance of Writ of Error.

Now come Harry Kockos and Andrew Kockos, copartners doing business under the firm name and style of Kockos Bros., and Kockos Bros., defend-

ants in the above-entitled action, by their attorneys and respectively show:

That on, to wit, the 7th day of June, 1922, the jury in the above-entitled cause rendered its verdict in favor of the said plaintiff C. Itoh & Co., and against said defendants; on, to wit, the 7th day of June, 1922, final judgment was made and entered in the above-entitled action in favor of the above plaintiff and against the said defendants; your petitioners, feeling aggrieved with the said judgment, herewith petition for an order to allow them to prosecute a writ of error to the United States Circuit Court of Appeal in and for the Ninth Circuit, under the laws of the United States in such cases made and provided;

WHEREFORE, the premises considered, your petitioners pray that a writ of error in their behalf to the United States Circuit Court of Appeal, Ninth Circuit, sitting in the City and County of San Francisco, State of California, in and for said Circuit, for the correction of errors committed by said Court at said trial and said verdict and in entering said judgment, for the reason set forth in petitioners' assignment of errors filed therein, and that a transcript of the record, proceedings and papers upon which said trial was had and judgment was based, duly authenticated, may be sent to the United States Circuit Court of Appeal for the Ninth Circuit, and your petitioners will ever pray.

RAYMOND PERRY,
JOHN S. PARTRIDGE,
Attorneys for Petitioners. [98]

[Endorsed]: Filed Jul. 7, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [99]

(Title of Court and Cause.)

Assignment of Errors.

Now come the defendants in the above-entitled cause and file the following assignment of errors upon which they will rely in the prosecution of their writ of error to review a final judgment made and entered against them on the 7th day of June, 1922, in the above-entitled action.

I.

That the Court erred in refusing to permit the defendants herein to file their demurrers and in refusing to consider their demurrers herein.

II.

That the complaint of plaintiff on file herein does not state facts sufficient to constitute a cause of action against these defendants or either of them.

III.

The Court erred in admitting evidence of the custom of the trade to the effect that peanuts 36/38 count complied with the terms of this contract providing that the peanuts should be 40 count in this, that the contracts specifically provided that the peanuts should be 40 count, and that the Chamber of Commerce certificate should be final.

IV.

The Court erred in denying defendants' motion

for a nonsuit in this, that the plaintiff's evidence showed that the contract was for peanuts 40 count, Chamber of Commerce Certificate to be final, and the plaintiff's evidence showed that 1600 out of the 2000 bags were 36/38 count and the Chamber of Commerce certificates shows that the same were 36/38 count. [100]

V.

The Court erred in denying defendants' motion for a nonsuit as to 400 bags of the peanuts involved in the said contract in this, that the plaintiff's evidence shows that 400 bags of said peanuts complied with the said contract and that the defendants offered to accept and pay for the said 400 bags and plaintiff refused and sold the same.

VI.

The Court erred in refusing to allow testimony of defendants as to contract with National Importing and Trading Company in this, that it was preliminary to evidence showing a specific instance of refusal to accept 36/38 count peanuts on a contract calling for 40 count average as bearing on the general trade custom.

VII.

That the Court erred in refusing testimony of defendants showing that the National Importing and Trading Company was located in Chicago, in this, that it was evidence tending to show lack of knowledge of said company that the peanuts were not 40 count and therefore that there was no waiver of the defect.

VIII.

That the Court erred in refusing evidence of defendants showing rejection of the 1600 bags of peanuts by National Importing and Trading Company because they were not 40 count in this, that said evidence tended to prove the general custom of the trade as to such practice.

IX.

The Court erred in refusing evidence of defendants as to what information defendant was relying on when he gave shipping instructions to plaintiff in this, that said testimony tended to prove that defendant had no knowledge of the variation of the size of the peanuts from the contract [101] count and so did not waive the defect.

X.

The Court erred in refusing to instruct the jury that the Chamber of Commerce certificates as to count were final and the only information upon which defendants could rely as to the count in accordance with request of defendants, in this, that the contract stated that the Chamber of Commerce certificates as to count should be final and defendant having given shipping orders before knowing what the Chamber of Commerce certificates showed as to count could not have had knowledge of the defect and hence could not have waived the defect.

XI.

The Court erred in failing to instruct the jury to find for the defendants in accordance with the request of said defendants.

WHEREFORE, defendants pray that said judgment be reversed and that this action be remanded to the Southern Division of the District Court of the United States, for the Northern District of California, Second Division, directing the said Court to retry said action on all the issues raised by the pleadings herein.

RAYMOND PERRY,
JOHN. S. PARTRIDGE,
Attorneys for Defendants.

[Endorsed]: Filed Jul. 7, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [102]

(Title of Court and Cause.)

Order Allowing Writ of Error and Fixing Bond.

Upon reading and filing the petition for writ of error of the said defendants in the above-entitled cause, as likewise the prayer for reversal of the judgment heretofore entered,—

IT IS ORDERED that said writ of error be and it is hereby allowed and the bond is fixed at the sum of Three Hundred Dollars ($300.00).

Dated: June 7, 1922.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jul. 7, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [103]

(Title of Court and Cause.)

Appeal Bond.

KNOW ALL MEN BY THESE PRESENTS: THAT WHEREAS, in an action in the District Court of the United States in and for the Northern District of California, Southern Division, a judgment was on the 7th day of June, 1922, rendered in favor of the above-named plaintiff and against the above-named defendants in said cause;

AND WHEREAS, the said defendants are dissatisfied with said judgment and are desirous of reversing the same, and to that end have sued out and been allowed a writ of error addressed to said above-entitled court, for the purpose of reviewing and reversing the said judgment:

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES and of such Writ of Error, we, the undersigned, John Cosmos of San Francisco, California, and Joseph Hurych of Oakland, California, both residents, householders and freeholders in said Northern District of California, are held and firmly bound and do hereby jointly and severally undertake in the sum of Three Hundred Dollars ($300.00), and promise on behalf of the defendants in the above-entitled cause that said defendants will pay all damages and costs which may be awarded against them on said writ of error, or the affirmance of said judgment, or on a dismissal of said writ of error, not exceeding the aforesaid sum of Three Hundred Dollars

($300.00), to which amount they and each of them acknowledge themselves bound.

AND THE SAID SURETIES do further agree that in the event of a breach of any condition hereof, and if the said defendants herein shall not successfully prosecute their writ of error, [104] or if the same be dismissed, then the above-entitled court may, upon notice to us, the said sureties, of not less than ten (10) days, proceed summarily in the above-entitled action to ascertain the amount which we, the said sureties, are bound to pay on account of said breach and render judgment therefor against us and award execution therefor.

JOHN COSMOS. (Seal)
JOSEPH HURYCH. (Seal)

United States of America,
Northern District of California,
State of California,
City and County of San Francisco,—ss.

John Cosmos and Joseph Hurych, being first duly sworn, each separately and not one for the other allege that each of them is a resident and householder and freeholder within the Northern District of California and that each of them is worth the amount specified in the above bond or undertaking over and above all his debts and liabilities, exclusive of property exempt from execution.

JOHN COSMOS.
JOSEPH HURYCH.

Subscribed and sworn to before me this 26th day of June, 1922.

[Seal] W. H. PYBURN,

Notary Public in and for the City and County of San Francisco, State of California.

Approved:

M. T. DOOLING,

Judge.

[Endorsed]: Filed Jul. 7, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [105]

(Title of Court and Cause.)

Order for Supersedeas.

IT APPEARING TO THE COURT that the defendants in the above-entitled cause have duly and regularly filed their petition for a writ of error to reverse the judgment of said Court in said action, together with their assignment of errors and a prayer for reversal, and all and singular the premises having been considered,—

IT IS ORDERED that said judgment be, and it is hereby, suspended and superseded upon the execution by said defendants of an undertaking to be approved by me, a Judge of said court, with two sufficient sureties, in accordance with Rules 70 and 71 of this court, in the sum of Ten Thousand Dollars ($10,000.00).

Dated: June 7, 1922.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Jul. 7, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [106]

(Title of Court and Cause.)

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS: THAT WHEREAS, in an action in the District Court of the United States, in and for the Northern District of California, Southern Division, a judgment was on the —— day of June, 1922, rendered in favor of the above-named plaintiff, C. Itoh & Co., and against the above-named defendants, Harry Kockos and Andrew Kockos, copartners doing business under the firm name and style of Kockos Bros., and Kockos Bros., a partnership;

AND WHEREAS, defendants are dissatisfied with said judgment and are desirous of reversing the same, and to that end have sued out and been allowed a writ of error addressed to said above-entitled court for the purpose of reviewing and reversing said judgment;

AND WHEREAS, the amount of said judgment is the sum of Eighty-five Hundred Dollars, ($8500.00);

AND WHEREAS, the above-entitled Court has made an order for a supersedeas in said cause upon the execution by said defendant, Harry Kockos and Andrew Kockos, copartners doing business under the firm name and style of Kockos Bros. and Kockos Bros., a partnership, of an undertaking

in accordance with Rules 70 and 71 of said Court, in the sum of Ten Thousand Dollars ($10,000.00);

NOW THEREFORE, IN CONSIDERATION OF THE PREMISES and of the said writ of error and supersedeas, we, the undersigned, John Cosmos and Gust Contos, both of San Francisco, California, both residents, householders and freeholders of the City and County of San Francisco, in said Northern District of California, are held and firmly bound and do hereby jointly and severally undertake in the sum of Ten Thousand Dollars ($10,000.00), and promise on behalf of the defendants in said United States [107] District Court, and the said writ of error, that the said defendants will pay the said judgment, together with interest thereon and all costs and damages in the event that said judgment is affirmed, or on a dismissal of said writ of error, not exceeding the aforesaid sum of Ten Thousand Dollars ($10,000.00), to which amount they, and each of them, acknowledge themselves bound.

AND THE SAID SURETIES do further agree that in the event of a breach of any condition hereof, and in the event that the said defendants herein should not successfully prosecute their writ of error, or if the same be dismissed, then the above-entitled court may, upon notice to us, the said sureties, of not less than ten days, proceed summarily in the above-entitled action to ascertain the amount which we, the said sureties, are bound to pay on account of said breach, and render judg-

ment therefor against us and award execution therefor.

JOHN COSMOS.
GUST CONTOS.

United States of America,
Northern District of California,
State of California,
City and County of San Francisco,—ss.

John Cosmos and Gus Contos, being first duly sworn, each separately and not one for the other, allege:

That each of them is a resident, householder and freeholder within the Northern District of California, and that each of them is worth the amount specified in the above bond or undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution.

JOHN COSMOS.
GUST CONTOS.

Subscribed and sworn to before me this 21st day of June, 1922.

[Seal] W. H. PYBURN,
Notary Public in and for the City and County of San Francisco, State of California.

Approved:

M. T. DOOLING,
Judge. [108]

[Endorsed]: Filed Jul. 7, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [109]

(Title of Court and Cause.)

Praecipe for Record on Writ of Error.

To the Clerk of Said Court:

Sir: Please prepare record on writ of error and incorporate therein the following:

1. Judgment-roll.
2. Bill of Exceptions.
3. Petition for Allowance of Writ of Error.
4. Assignment of Errors.
5. Order Allowing Writ of Error, etc.
6. Appeal Bond.
7. Order for Supersedeas.
8. Supersedeas Bond.
9. Praecipe for Record.
10. Original Writ of Error and Citation on Writ of Error.

JOHN S. PARTRIDGE,
Attorney for Defendants.

[Endorsed]: Filed Sept. 7, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [110]

(Title of Court and Cause.)

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing one hundred ten (110) pages, numbered from 1 to 110, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the

praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $50.60; that said amount was paid by the defendants, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 25th day of September, A. D. 1922.

[Seal] WALTER B. MALING,

Clerk United States District Court for the Northern District of California. [111]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of Ameria, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division.

GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you between Harry Kockos and Andrew Kockos, copartners doing business under the firm name and style of Kockos Bros., and Kockos Bros.,

a partnership, plaintiffs in error and C. Itoh & Co., a corporation, defendant in error, a manifest error hath happened, to the great damage of the said Harry Kockos and Andrew Kockos, copartners doing business under the firm name and style of Kockos Bros., and Kockos Bros., a partnership, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in his behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States,

the 7th day of July, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by:

M. T. DOOLING,
United States District Judge. [112]

RETURN TO WRIT OF ERROR.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk U. S. District Court, Northern District of California.

[Endorsed]: No. 16,454. United States District Court for the Northern District of California, Second Division, C. Itoh & Co., a Corporation, Plaintiff in Error, vs. Harry Kockos and Andrew Kockos, Copartners Doing Business Under the

Firm Name and Style of Kockos Bros., and Kockos Bros., a Partnership, Defendants in Error. Writ of Error. Filed Jul. 8, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Receipt of copy of the within writ of error is acknowledged this 8th day of July, 1922, *is* hereby admitted.

BROWNSTONE & GOODMAN.
Attorneys for Plaintiff.

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to C. Itoh & Co., a corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, Second Division, wherein Harry Kockos and Andrew Kockos, co-partners doing business under the firm name and style of Kockos Bros., and Kockos Bros., a partnership, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern District of California, this 7th day of July, A. D. 1922.

M. T. DOOLING,
United States District Judge. [113]

Receipt of copy of the within Citation on Writ of Error and this 8th day of July, 1922, is hereby admitted.

BROWNSTONE & GOODMAN,
Attorneys for Plaintiff.

[Endorsed]: No. 16454. United States District Court for the Northern District of California, Second Division. C. Itoh & Co., a Corporation, Plaintiff in Error, vs. Harry Kockos and Andrew Kockos, Copartners Doing Business Under the Firm Name and Style of Kockos Bros., and Kockos Bros., a Partnership, Defendants in Error. Citation on Writ of Error. Filed Jul. 8, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed: No. 3926. United States Circuit Court of Appeals for the Ninth Circuit. Harry Kockos and Andrew Kockos, Copartners Doing Business Under the Firm Name and Style of Kockos Bros., and Kockos Bros., a Partnership, Plaintiffs in Error, vs. C. Itoh & Co., Ltd., a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of

the Northern District of California, Second Division.

Filed September 25, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

HARRY KOCKOS and ANDREW KOCKOS, Copartners Doing Business Under the Firm Name and Style of KOCKOS BROS., and KOCKOS BROS., a Partnership,
Plaintiffs in Error,

vs.

C. ITOH & CO., a Corporation,
Defendant in Error.

Order Extending Time to and Including September 6th, 1922, to File Record on Writ of Error and to Docket Cause.

Good cause being shown, it is hereby ordered that the plaintiffs in error in the above-entitled cause may have to and including September 6th, 1922, within which to file the record on writ of error and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: August 5th, 1922.

WM. W. MORROW.

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 3926. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Sept. 6, 1922, to File Record and Docket Cause. Filed Aug. 5, 1922. F. D. Monckton, Clerk. Refiled Sept. 25, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

HARRY KOCKOS and ANDREW KOCKOS, Copartners Doing Business Under the Firm Name and Style of KOCKOS BROS., and KOCKOS BROS., a Partnership,

Plaintiffs in Error,

vs.

C. ITOH & CO., a Corporation,

Defendant in Error.

Order Extending Time to and Includins October 6th, 1922, to File Record on Writ of Error and to Docket Cause.

Good cause being shown, it is hereby ordered that the plaintiffs in error in the above-entitled cause may have to and including October 6th, 1922, within which to file the record on writ of error

and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: September 6, 1922.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 3926. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including ———, 192—, to File Record and Docket Cause. Filed Sept. 6, 1922. F. D. Monckton, Clerk. Refiled Sept. 25, 1922. F. D. Monckton, Clerk.